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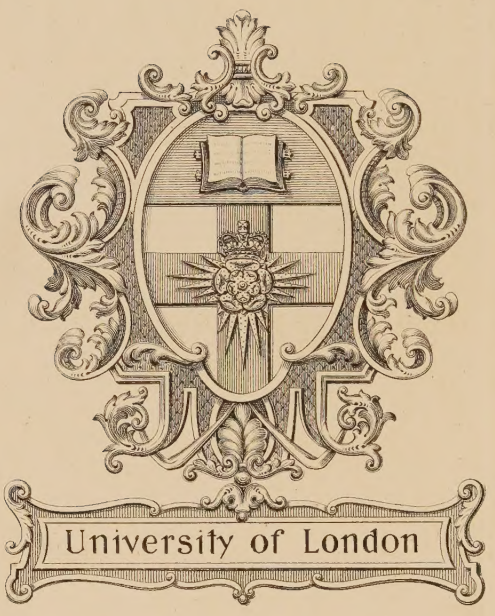

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.

1925

June 9;
July 30.

SEDGWICK COLLINS AND COMPANY *v.* ROSSIA INSURANCE COMPANY OF PETROGRAD.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION (GARNISHEES).

Practice—Garnishee Order—Discretion of Court—Discharge of Garnishee—Liability to pay a second Time—Debt due to foreign Company.

The defendants, a company incorporated in Russia, had before the war a branch office in London, and in compliance with the requirements of s. 274 of the Companies Act, 1908, had registered one C. as their agent to accept service of any judicial process that might be issued against them. In 1918 the defendants' business and its assets were by revolutionary legislation transferred to the Soviet Government. In 1923 an action was brought here to recover a debt alleged to be due

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from the defendants to the plaintiffs, the writ being served on C., whose name, notwithstanding his protest that by reason of the said legislation the defendant company had ceased to exist, still remained on the register, and in default of appearance judgment was signed against the defendants. The plaintiffs obtained a garnishee order nisi to attach a debt due to the defendants from third parties in this country. Subsequently to the service of that order liquidation proceedings were commenced against the defendants. The liquidator did not contest the validity of the judgment:—

Held (by Bankes and Sargant L.JJ.; Scrutton L.J. dissenting): (1.) That as the defendants by carrying on business in this country had submitted to the jurisdiction, it must be assumed that the Soviet Government would recognize the service of the writ, which was in accordance with English law, and the consequent regularity of the judgment;

(2.) that, as the debt owing from the garnishees to the defendants was governed by English law, according to which a judgment creditor of a company in liquidation who has obtained a garnishee order nisi before the commencement of the liquidation thereby becomes a secured creditor of the company, the payment by the garnishees of the amount of the judgment debt would be a discharge pro tanto of the debt due from them to the defendants, and it must be assumed that the Soviet Government would follow the ordinary rules of international comity and admit the validity of that payment; and

(3.) that under those circumstances the garnishee order ought to be made absolute.

Scrutton L.J., contra, was of opinion that it was not improbable that the Soviet Government would refuse to recognize a service effected on an agent of the defendants after they had ceased to carry on business in this country and in disregard of his disclaimer of authority to represent them, and that the consequent risk of the garnishees being called upon by the Soviet Government to pay the debt due to the defendants over again was sufficient to justify the Court in refusing to make the order absolute.

Sea Insurance Co. v. *Rossia Insurance Co.* (1924) 20 Ll. L. Rep. 308 distinguished.

APPEAL from an order of Fraser J. dismissing an appeal from an order of a master, whereby he discharged a garnishee order nisi.

The Rossia Insurance Company, which was a company incorporated in Russia, established a branch business in London, and in 1917 in pursuance of the provisions of s. 274 of the Companies Act, 1908, filed with the registrar of companies the name and address of a Mr. A. J. Collins as a "person resident in the United Kingdom authorized to accept on behalf of the company service of process." By that section, "in the event of any alteration being made . . . . in the name

or address of any such person . . . . the company shall . . . . file with the registrar a notice of the alteration." By a decree of the Russian Council of People's Commissaries in November, 1918, insurance business of all kinds was declared to be the monopoly of the State, and private joint stock insurance companies were made subject to liquidation, the assets of such companies realized on their liquidation becoming the property of the Russian Republic. No notice of alteration of the person authorized to represent the defendants in London was filed with the registrar under s. 274, by the company or its liquidator. The Rossia Company had before its "nationalization" in 1918 issued a number of policies of marine insurance to Messrs. Sedgwick Collins & Co., and was alleged to be indebted upon those policies in a sum of 4520*l*. On May 31, 1923, Sedgwick Collins & Co. commenced an action in the High Court against the Rossia Company to recover that sum, the writ being served upon Mr. A. J. Collins under s. 274. Mr. Collins protested that he was not the right person to be served, as by the nationalization of the company its interests had become vested in the Russian liquidator, and he had received no authority from the liquidator to accept service on his behalf. The defendant company did not appear, and on June 12, 1923, judgment was entered for the plaintiffs by default. The judgment creditors obtained a garnishee order nisi against the Employers' Liability Assurance Corporation, who were alleged to be indebted to the judgment debtors in a sum exceeding the amount of the judgment debt, attaching all debts due by the said corporation to the judgment debtors to answer the judgment. Subsequently the master discharged that order upon the ground that if the garnishees paid the amount of the judgment debt there was a substantial risk that they might be compelled at the suit of the Soviet Government to pay the money over again. An appeal against that order was dismissed by Fraser J., who however did not give his reasons for the dismissal.

The judgment creditors appealed.

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SEDGWICK COLLINS & Co. v. ROSSIA INSURANCE COMPANY OF PETROGRAD.

Rayner Goddard K.C. and *Hon. S. O. Henn Collins* for the appellants. In July, 1924, in a garnishee proceeding in which the judgment debtors and the garnishees were respectively the same as in the present case and the *Sea Insurance Co.* v. *Russia Insurance Co.* (1) were the judgment creditors, the People's Commissariat of Russia, having been invited to give attention to the rights and liabilities of the Rossia Company, stated that they did not think it necessary to take proceedings to claim the debt due from the garnishees, but the Court of Appeal nevertheless discharged the garnishee order. Here, as the Soviet Government have made no corresponding disavowal of an intention to claim the debt, the master regarded the case as an a fortiori one, and the judge presumably went upon the same ground. But the *Sea Insurance Co.* case (1) is distinguishable. There certain directors of the Rossia Company after its "nationalization" professed, without authority, to carry on the business of the company in Paris, and the writ was served upon them there. Judgment, as in the present case, went by default. But the reason why the Court discharged the garnishee order was that the service was altogether irregular, the case being distinguished on that ground from *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (2), where the defendants by appearing, submitted to the jurisdiction. Here the service was regular, the defendants having submitted to the jurisdiction by establishing a business branch here, and according to the decision of the House of Lords in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (3) upon the construction of the Soviet Government's decrees "nationalizing" joint stock companies it was not sufficiently proved that they were dissolved and that debts due to them were no longer their property. The writ here was served upon the only person upon whom it could be served—namely, the person designated under s. 274. No doubt, as was said by Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (4), "In a personal action . . . . a decree pronounced

(1) 20 Ll. L. Rep. 308.
(2) [1923] 1 K. B. 673.
(3) [1925] A. C. 112.
(4) [1894] A. C. 670, 684.

in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity," but that rule does not apply here. In *Schibsby* v. *Westenholz* (1), where it was held that a judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in an English Court if the defendant was not a subject of nor resident in the country of that judgment, Blackburn J. said: "If the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them." It is true that here Mr. Collins has since the nationalization of the company refused to recognize the continuance of his authority to represent it, and has endeavoured without success to get himself discharged from the position of its agent. But that discharge can only be effected at the instance of the company and under an order of the Court, and the company has not taken any steps to discharge him. The case is analogous to that of a solicitor whose name has appeared on the record of an action, and who, according to the old practice of the Chancery Court, could not be removed from the record without an order of the Court obtained at the instance of the client: *Wright* v. *King* (2), a practice which is now established by the Rules of Court, Order VII., r. 3.

Jowitt K.C. and *Carthew* for the respondents. The master was right in treating the present case as covered by the *Sea Insurance Co.'s* case. (3) No doubt that case is distinguishable upon the ground that there the service of the writ was irregular, but that was not the only ground upon which the Court there discharged the garnishee order. Sargant L.J. treated that as only a second ground, his first being that it was doubtful whether payment under the garnishee order would operate as a discharge pro tanto in Russia. There the statement of the Soviet Government that they did not think it necessary

(1) (1870) L. R. 6 Q. B. 155, 161. (2) (1846) 9 Beav. 161.
(3) 20 Ll. L. Rep. 308.

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to take proceedings was treated as an insufficiently explicit statement that they did not intend to claim the debt alleged to be due from the garnishees to exclude all risk of their possibly doing so at a later date. As in the present case the Soviet Government have made no statement one way or the other, the risk of the garnishees having to pay the money over again was one which a fortiori existed here. The Russian Courts would not recognize these proceedings. In the opinion of a Russian lawyer, M. Krougliakoff, who made an affidavit in this case, the effect of the nationalization of joint stock companies in Russia was to put an end altogether to their existence, and the Russian Courts would probably put that interpretation on the revolutionary legislation. They would not be bound by the decision of the House of Lords to the contrary.

Rayner Goddard K.C. in reply.

Cur. adv. vult.

Since the date of the order appealed from an order was made by Romer J. for the winding up of the Rossia Company in this country. The Court of Appeal postponed delivering judgment in the garnishee proceedings until they had been informed by the liquidator whether any objection could be taken to the judgment recovered by the plaintiffs. He reported that in his opinion the judgment was properly obtained.

July 30. The following written judgments were delivered :—

BANKES L.J. On June 12, 1923, Sedgwick Collins & Co., Ld., signed judgment against the Rossia Insurance Company of Petrograd for 4513*l.* in default of appearance. Service of the writ had been effected by leaving a true copy of the writ of summons with a Mr. Arthur John Collins, the person authorized by registration in England to accept service on behalf of the defendants under the Companies Act, 1908, s. 274. The fact that service was regularly effected under the provisions of this statute is in my opinion of overriding importance in the present case.

On December 20, 1924, the judgment creditors obtained a garnishee order nisi attaching any moneys due from the Employers' Liability Assurance Corporation, Ld., to the judgment debtors. Two applications were then made, the one by the garnishees to set aside the judgment obtained by the judgment creditors, and the other by the judgment creditors to make the garnishee order absolute. Both applications came before Master Ball, who refused to set aside the judgment, and discharged the order nisi. The learned judge at chambers affirmed the master on both appeals, but in the one directed that if notice of appeal was given within a stated time the order nisi was to stand until the appeal was heard, and in the other he gave the necessary leave to appeal. From those orders the present appeals are made. We are told that the learned judge gave no reasons for his decisions. We are furnished with a written judgment of the master upon the application to make the garnishee order absolute. With reference to the appeal against the order refusing to set aside the judgment I see no ground whatever for interfering with the order, which appears to be in accordance with *Jacques* v. *Harrison* (1) and established practice. That appeal is therefore dismissed with costs.

With regard to the order refusing to make the garnishee order absolute there are several matters which require careful consideration. In the judgment given by the learned master he refers to *Martin* v. *Nadel* (2), an authority which emphasizes the rule that the making of a garnishee order is discretionary, and goes on to decide that an order which would have the effect of leaving the garnishee liable to pay the amount of his debt a second time is inequitable, and should be refused; and he refers also to some observations of mine in the *Sea Insurance Co.* v. *Rossia Insurance Co.* (3) as indicating a view which he thought he ought to adopt as applicable to the present case. Upon this ground and upon the ground that in his opinion the present case was, as compared with the *Sea Insurance* case (2), an a fortiori one, he set the order nisi aside. I fully

(1) (1884) 12 Q. B. D. 165. (2) [1906] 2 K. B. 26.
(3) 20 Ll. L. Rep. 308.

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recognize the importance of acting upon the rule that this Court does not interfere with the exercise of the discretion of a learned judge in chambers, where that discretion has been exercised judicially and on proper materials. In the absence of any statement of the grounds upon which the learned judge proceeded it is fair, I think, to assume that he accepted the view of the learned master. If this is so I do not regard this case as one turning upon a question of discretion. In my opinion the learned master failed to observe what appears to me to be an all-important distinction between the present case and the *Sea Insurance* case. (1) In the latter case not only was the service effected out of the jurisdiction, but it was as such a service entirely irregular. Apart from the irregularity, the service being a service out of the jurisdiction, the Soviet Government were under no obligation as a matter of international comity to pay any attention to a service so effected, and it was in view of that state of affairs that I made the observations I did with reference to the insufficiency of the Soviet Government's declaration as to its intentions. The present case appears to me to present no similar difficulties. As a matter of international comity I imagine that any civilized nation whose national takes advantage of our municipal law in order to secure a business footing in this country will observe and recognize the conditions upon which alone the national obtains that advantage. So far therefore from having any doubt whether the Soviet Government will recognize the validity of the service I must assume that they will certainly do so, and under those circumstances the foundation upon which the learned master rested his decision disappears, and I see no reason why the order absolute should not have been made in the first instance. I am not impressed with the fact that Mr. Collins' name remains on the file against his will. He was placed there by the Rossia Company to serve their purposes, and to represent them. If they wish to remove his name they, or those who now represent them, can do so, but it appears to me to be a condition imposed by the statute that a person who consents to his name being

(1) 20 Ll. L. Rep. 308.

placed on the file must remain there unless and until the removal of the name is effected in the manner authorized by the section.

Since the matter was before the learned judge in chambers an order has been made for the winding up of the Rossia Company. We gave the official receiver, who is acting as the official liquidator, an opportunity of considering the position. He informs us that he does not intend to challenge the judgment. Under these circumstances it would in my opinion be a hardship to deprive the judgment creditors of the opportunity of becoming secured creditors, and I also think the liquidation and the refusal of the liquidator to challenge the judgment are matters which the Court can legitimately take into consideration as justifying a different view from that taken at chambers.

The judgment creditors' appeal must be allowed with costs in any event, and an issue must be directed. I assume that all that is necessary to be said is that in the issue the judgment creditors will be plaintiffs and that the issue will follow the ordinary form, 40B, Appendix K.

SCRUTTON L.J. This appeal raises yet another of the troublesome questions raised by the policy of nationalizing or destroying private industries carried out more or less completely by the Soviet Government, which is recognized by the British Government as the de jure Government of Russia.

The present difficulty arises in this way. The Rossia Insurance Company incorporated under the pre-Soviet laws of Russia had from 1912 to 1918 a branch office in this country, of which a Mr. Collins was at first secretary and then manager. The company at first acted as a reinsurer, and then as a direct insurer. Being a foreign company carrying on business in this country it was required by s. 274 of the Companies Act, 1908, to register certain particulars, including the name of a person on whom judicial process as against the company could be served; and in December, 1917, some of these particulars were registered, including the name of Mr. Collins, as the representative of the company who might be served.

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The Soviet Government took certain action against insurance companies described in the affidavit of Mr. Krougliakoff. In particular, according to Mr. Krougliakoff, the liquidation of the Rossia Company in Russia was finished by January 14, 1919. This liquidation, however, took no account of sums due to the Rossia Company by English debtors or by the Rossia Company to English creditors. An English creditor of the Rossia Company desired to pay himself by annexing an alleged debt due to the Rossia Company from an English debtor, and to do this by using English garnishee proceedings. But the first step for this was to get the debt owed to the creditor by the Rossia Company established by a judgment. How to do this was indeed a problem. How was one to serve a company apparently liquidated and swallowed up by the Soviet Government? The first attempt was that which failed in the case of the *Sea Insurance Co.* (1) Some, not all, of the old directors of the Rossia Company escaped from Russia, and were in Paris trying to keep together the business of the pre-Soviet company. Service of a writ out of the jurisdiction was effected on the Paris directors in a very odd way described in the judgments in that case, and they allowed judgment to go by default. Armed with this judgment the Sea Insurance Company obtained a garnishee order nisi to garnish a debt alleged to be due to the Rossia from the Employers' Liability Assurance Corporation. But this Court, affirming Greer J., declined to make the order absolute for the reasons appearing in the judgments.

Messrs. Sedgwick Collins & Co., other alleged creditors of the Rossia, then tried another method. The unfortunate Mr. Collins, a different Mr. Collins from the member of the plaintiff firm, was still on the English register as a person on whom notices could be served, and, indeed, though he tried, there seemed to be no way of getting him off. A writ claiming 4520*l.* under thirteen specified policies of insurance addressed to the Rossia Insurance Company of Petrograd was served on Mr. Collins, who not unnaturally did not appear, and judgment by default was entered for that amount. It is obvious that

(1) 20 Ll. L. Rep. 308.

there is no great security that the sum claimed is accurate. The writ claims on thirteen policies of insurance; Mr. Collins' affidavit stated that only nine policies were ever issued to the plaintiffs. Claims on reinsurance policies are notoriously complicated, and while I should be the last to impute bad faith to the highly respectable firm who are plaintiffs, it is obvious that to get a judgment by serving a writ on a person who is known not to be going to defend it may in other cases lead to inaccuracy in claims. The judgment being recovered a garnishee order nisi was obtained against the Employers' Liability Corporation, who were alleged to owe the Rossia Company an amount exceeding the amount of the plaintiffs' judgment against the Rossia Company, but who disputed that at the present time any amount at all was due from them to the Rossia. The master and judge, however, refused to make the order absolute, the master on the ground that there was a risk that the garnishees might be called upon to pay a second time, the judge without stating reasons. The plaintiffs now appeal. Further, to complicate the matter, an order has recently been made by Romer J. to wind up the Rossia Company. The service in this case was also by service on Mr. Collins. We were not told who was the petitioning creditor, but the official receiver informed the Court that he had not yet had time to look into the matter of the present plaintiffs' judgment, or the general relations of the creditors. Without expressing any opinion as to whether he could do so, it was obvious that the official receiver in the interests of unsecured creditors might desire to attack the judgment which makes one of them a secured creditor, in view of its being a default judgment, and would also desire to investigate the amount due from any debtor. We accordingly postponed judgment till the official receiver determined what he would do. A message has been conveyed to us to the effect, as I understand, that the official receiver has not had a meeting of creditors (though I should have thought the unsecured creditors were the persons specially interested in this case), but has decided not to attack the judgment, which I suppose means that he is satisfied that the judgment, both in form

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and amount, represents a valid claim against the Rossia Company. We have, therefore, to decide the question whether we shall reverse the order of the judge below, and make the garnishee order absolute. The order to make absolute is not of right but of discretion, and we should not interfere with the discretion of the learned judge in refusing an order absolute, unless there were no grounds on which he could exercise that discretion. The difference between this case and the *Sea Insurance* case (1) is this: In the *Sea Insurance* case (1) the judgment was obtained by service out of the jurisdiction under an order of the Court, and this Court thought the service was probably irregular, though the judgment had not been set aside. In the present case the judgment has been obtained by service on a person on the register, after the company has ceased to carry on business in this country, and when the person concerned has entered on the register a disclaimer of any authority to represent the company. In each case the judgment may be said to be regular by the lex fori, and, indeed, in the latter case the Court is using service on Mr. Collins as the foundation of a winding-up order. But just as foreign countries do not recognize English laws as to service out of the jurisdiction, there appears considerable ground for saying that they would not recognize English law which binds a foreign company, which has ceased to carry on business in the jurisdiction, by the nomination of an agent to receive service while they were carrying on business in the jurisdiction. The suggestion that a man who had contracted in the jurisdiction could be dealt with on that ground after he had left the jurisdiction was apparently negatived by the Privy Council in the case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*. (2) It appears to be quite arguable whether the Russian Government or any other civilized State would be bound by international comity to recognize a judgment by default obtained by service of the kind in the present case, though such service was in accordance with the lex fori. In the *Sea Insurance* case (1) there was a very carefully guarded statement by the Soviet Government

(1) 20 Ll. L. Rep. 308.

(2) [1894] A. C. 670, 686.

as to their position. In the present case they have said nothing. Without deciding what effect in international law and comity would be given to the present judgment, it appears to me that there is amply sufficient doubt, as to whether the Soviet Government could be expected, obeying the ordinary rules which govern civilized States, to recognize it as an answer to a claim by them on the garnishees to pay to them the debt already garnished, to justify the judge below in using his discretion to refuse to make the garnishee order absolute. For it does not seem to me reasonable that a man who is no longer an agent of the foreign company, and who is protesting against being on the register as representing them, should be used as a means of obtaining a judgment by default against them.

I desire to add, as I have already said once, that the operations of the winding up of this company here should be very carefully limited. There is already a liquidation in the country of origin, Russia. As far as I can find winding-up orders here have hitherto been treated only as ancillary to the main liquidation and carefully limited in effect. Kay J. in *In re Matheson Brothers* (1) used the liquidation to secure that English assets were available to English creditors pari passu with New Zealand creditors; and I suppose it would follow, to New Zealand creditors pari passu with English creditors. North J., in *In re Commercial Bank of South Australia* (2), apparently limited the operations to securing English assets and making a list of English creditors. I have no doubt these matters will be borne in mind in the winding-up proceedings; but hitherto there has, I think, been no consideration of hostile windings up and competition between creditors of different nations. In my opinion the appeal should be dismissed with costs on the ground that the judge had materials on which to exercise his discretion in refusing to make the order absolute.

On the appeal by the garnishees to set aside the original judgment we are bound by previous decisions of the Court to dismiss the appeal with costs.

(1) (1884) 27 Ch. D. 225, 231. (2) (1886) 33 Ch. D. 174, 178.

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SARGANT L.J. The circumstances in the present case differ in two important respects from those in the case decided by this Court last December, in which the *Sea Insurance Co.* (1) were seeking a garnishee order absolute against the moneys owing to the Rossia Insurance Company from the Employers' Liability Assurance Corporation. In the first place, the plaintiffs here have obtained judgment against the Rossia Company in an action in which they have served the person appearing on the file kept in pursuance of s. 274 of the Companies Consolidation Act, 1908, as the person authorized to accept, on behalf of the company, service of process in the United Kingdom; and in the second place, since the present application was before Fraser J. an order has been made by Romer J. for the compulsory winding up of the Rossia Company in this country. I will deal with these two differences in the order in which I have mentioned them.

In the case of the *Sea Insurance Co.* (1) the main reasons for declining to make the garnishee order absolute were, that the writ had been served not on the Rossia Company but on an entirely different and, indeed, competing association of persons, that the Rossia Company had never been made amenable or submitted to the jurisdiction of these Courts in the action, and that it was highly improbable that the Courts of Russia or, indeed, of any foreign country, would recognize the validity of a judgment thus obtained in default. And the case was distinguished from that of the *Swiss Bank Corporation* v. *Boehmische Industrial Bank* (2) on the ground that in the last mentioned case the defendants had submitted to the jurisdiction. But in the present case the Rossia Insurance Company, being desirous of carrying on business in this country, and being precluded from doing so by the Companies Consolidation Act, 1908, except upon the terms of complying with s. 274 of that Act, proceeded in or about the year 1917 to file with the registrar of companies certain particulars, including the name of a Mr. Collins as the person authorized to accept process for them; and the liabilities in respect of which the present judgment was obtained were

(1) 20 Ll. L. Rep. 308. (2) [1923] 1 K. B. 673.

incurred in respect of business carried on in this country and prior to the confiscatory decrees in Russia in the year 1919. In these circumstances I think that the Rossia Insurance Company did by this registration submit to the jurisdiction of the Courts of this country in respect of business conducted here, and that the case is within the principle of the *Swiss Bank Corporation* (1) decision rather than of the *Sea Insurance Co.* (2) decision. It is true that Mr. Collins has attempted to disclaim his position as representing the Rossia Company in this country. But this he cannot, in my judgment, do, so as to affect the position of creditors in this country. Otherwise, it would be possible for any foreign company desirous of doing business in this country to entirely escape at any convenient time from the results of compliance with s. 274 as to service of process by merely removing the name of their nominee from the register or instructing him to disclaim. Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which "nationalized" the undertaking and assets of the Rossia Insurance Company, that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here: see Dicey, Conflict of Laws, 2nd ed., p. 310, and *Lecouturier* v. *Rey* (3), an analogous case with reference to the goodwill of a trade mark or trade name in England.

The second difference above referred to is also of great practical importance. For the making of an order for the compulsory winding up of the company has necessarily resulted in the constitution of some one interested in obtaining the maximum amount of assets for the general creditors of the company, and therefore in examining into the judgment

(1) [1923] 1 K. B. 673. (2) 20 Ll. L. Rep. 308.
(3) [1910] A. C. 262.

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obtained by the plaintiffs, and taking any legitimate objection to it. When the present appeal was argued before us early in June last, the winding-up order had been so recently made that we thought an opportunity ought to be given to the official liquidator to conduct such an examination, and to decide on the proper course to pursue; and accordingly we postponed delivering judgment for the time being. But we have now received a communication that the official receiver, who is at present acting as the official liquidator, does not intend to attack the judgment; and therefore there appears to be no reason to doubt that the judgment was properly obtained in respect of a real liability of the Rossia Company to the plaintiffs.

This being so, the question we have to decide is really one between the official liquidator, as representing the general creditors of the Rossia Company, and the plaintiffs, as claiming to be creditors, having obtained a security for their judgment debt on the debt (whatever it may be) due to the Rossia Company from the garnishees: for, if the garnishee order nisi is discharged, the garnishees will thereafter have no answer to the claim by the liquidator to be paid the whole of the debt due from them to the Rossia Company. In determining this question it is, I think, clear that the law to be applied is that of this country, as being the place in which the debt due from the garnishees is deemed to be locally situate. Now, as to the English law, it is not disputed that a creditor who has, prior to the liquidation of a company, obtained a garnishee order nisi in respect of a debt owing to the company, has a security thereon in priority to the general creditors; and in my opinion, therefore, there is no valid reason for refusing to perfect the security by making absolute the present order nisi. It has been strenuously argued for the garnishees that there is a grave danger of the Soviet Government declining to recognize any payment by the garnishees under the order absolute as discharging their debt pro tanto, and that in this case the garnishees may find themselves liable to be charged in Russia a second time with the amount so paid. But if it is to be supposed that the Soviet Government is to disregard

the ordinary international comity in this respect, I see little less reason for supposing that they would also disregard a payment made by the garnishees to the liquidator in this country. The truth is that since our Government has recognized the Soviet Government as the Government of Russia, both de facto and de jure, it must be assumed that the ordinary rules of international comity in these matters will be recognized and applied in the same way as if the country in question had been, for instance, the Swiss Republic; and this being so the question has to be dealt with on the same lines as the *Swiss Bank Corporation* case (1) already mentioned.

For these reasons I am of opinion that this appeal should be allowed. I agree that the other appeal should be dismissed.

Appeal allowed.

Solicitors for the appellants: *Thomas Cooper & Co.*
Solicitors for the respondents: *Watson, Sons & Room.*

J. F. C.

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Oct. 15, 16.

[1924. G. 2915.]

Landlord and Tenant—Covenant to repair by Lessor—Breach—Notice of Breach not specifying Extent of non-repair—Injury to Lessee—Liability of Lessor.

In the lease of a dwelling-house the lessor covenanted to keep the exterior of the premises in good and substantial repair. During the currency of the term the lessee wrote to the lessor on April 2, 1924, that "the steps to the front door want attention." Thereupon the lessor communicated with his builders, who on April 8 inspected the premises and reported that "the front steps are in a dangerous condition, and being so defective we have put the matter in hand." The builders obtained an estimate for the work, and on April 16 the steps were repaired. In the meantime, however—namely, on April 14, while the lessee, who was unaware that the steps were dangerous, was leaving the house the steps collapsed and he fell into the cellar below sustaining serious

(1) [1923] 1 K. B. 673.

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injuries. In an action by the lessee to recover damages for breach of the lessor's covenant to repair:—

Held, (1.) that the letter of April 2 was a sufficient notice of want of repair, although it did not specify the precise degree of non-repair; (2.) that even if that letter could not be relied upon as express notice of non-repair it gave the lessor a right of entry, and the actual knowledge of the condition of the steps acquired by him on April 8 through his agents the builders prevented him setting up the absence of express notice; (3.) that having actual knowledge on April 8 of the dangerous condition of the premises the lessor was bound to take immediate steps to render the premises temporarily safe if the permanent repairs could not be executed at once; (4.) that the lessor had committed a breach of covenant; and (5.) that the lessee having been injured owing to that breach was entitled to recover damages.

ACTION tried by Wright J.

The plaintiff (hereinafter called "the lessee") claimed damages for breach of covenant.

The defendant (hereinafter called "the lessor") let a dwelling-house, 7 Tressillian Road, St. John's, S.E., to the lessee by a lease containing the following covenant: "And the lessor doth hereby covenant with the lessee that the lessor will from time to time and at all times during the said term keep the exterior of the said messuage and buildings, and the walls, fences, railings and drains thereof in good and substantial repair." During the currency of the term—namely, on April 2, 1924, the lessee wrote to the lessor, who resided at Worthing, in the following terms: "I think this house wants pointing, and the steps to the front door want attention. These matters can be attended to at or before the painting. It is useless, I take it, to think of them so long as everybody is employed at Wembley, or on strike there, which comes to much the same. July would suit me very well, if that is a possible month, as I see no reason why it should not be. Perhaps you will let me hear further in due course." The lessor, having received that communication, wrote to his builders thereon a letter dated April 5, in which he said (inter alia): "The steps to the front door, I understand, require attention." On April 8 the builders, having seen the premises, wrote to the lessor that "the front steps of No. 7 are in a dangerous condition, and being so defective we have put the matter in hand." The builders obtained

an estimate from a mason for the necessary work, and on April 16 the steps were repaired. In the meantime, however—namely, on April 14, while the lessee was leaving his house, the front steps collapsed and he fell into the cellar below, sustaining serious injuries to his leg. It was in respect of those injuries that he brought his action. The lessee, as the judge found, did not know that the steps were dangerous.

Schiller K.C. and *Hilbery* for the lessee.

W. Shakespeare (*Harold Morris K.C.* with him) for the lessor. Upon a covenant such as that now in question, the lessor is under no obligation until he has notice from the lessee of the want of repair: *Makin* v. *Watkinson* (1); *Torrens* v. *Walker* (2), and this is so even although the lessor has actual knowledge of the fact of non-repair: *Hugall* v. *M'Lean*. (3) All these cases were referred to in *Murphy* v. *Hurly* (4), where Lord Buckmaster, after stating that it was difficult to reconcile the decision in *Hugall* v. *M'Lean* (3) with the jury's findings of fact, said that "it is easy to understand the case if it be regarded, as the Master of the Rolls appears to have thought it should, as an ordinary case of a covenant to repair part of the demised structure that was in fact in the occupation of the tenant," which is the case here.

[WRIGHT J. I observe that Lord Sumner in *Murphy* v. *Hurly* (5) says that "in *Tredway* v. *Machin* (6), the Court of Appeal held, following *Hugall* v. *M'Lean* (3), that means of knowledge are not equivalent to actual knowledge for the purpose of charging the landlord." Does that involve that if the landlord has actual knowledge the position is different?]

No, the covenant must be read as if imported into it were the words "upon notice of non-repair given by the lessee." If I am right that the lessor's obligation arises only upon receipt of notice from the lessee of the non-repair, the lessor is entitled to a reasonable time to execute the repairs. What is a reasonable time must of course depend upon the facts of each case. Where, as in this case, the lessor is not a builder,

(1) (1870) L. R. 6 Ex. 25.
(2) [1906] 2 Ch. 166, 172.
(3) (1885) 53 L. T. 94.
(4) [1922] 1 A. C. 369.
(5) [1922] 1 A. C. 369, 389.
(6) (1904) 91 L. T. 310, 311.

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he must have time to communicate with his builders, obtain estimates, etc., and that must be taken into account in considering whether a reasonable time has elapsed before the repairs are executed. It is submitted that in this case a reasonable time had not expired by the date of the accident. It has been suggested that something should have been done in the nature of temporary repairs. As to that, the lessor instructed independent contractors to do what was necessary, and if there was any omission to put in struts or the like the fault was that of the independent contractors.

Hilbery in reply. The notice contained in the letter of April 2 was sufficient to fix the lessor with his obligation under the covenant. The notice, which need not specify the particular non-repair, gave the lessor a right of entry, and the consequent inspection by the builders was the lessor's inspection and brought home to him the necessity of temporary measures being taken at once to obviate danger if the permanent repairs could not be executed immediately. By the inspection on April 8 the lessor had actual knowledge of the non-repairs, and in view of that he cannot be heard to say that he had not received specific notice of want of repair in the letter of April 2. No case has decided that if a lessor has actual knowledge, at all events where he also has a right of entry, there is any necessity for the lessee to give notice of the non-repair. With regard to the contention that the lessor is entitled to a reasonable time, after notice from the lessee, within which to execute the repairs, the law makes no such implication. The language of Martin B. in *Makin* v. *Watkinson* (1) is against the suggested implication. Further, it is to be borne in mind that the covenant runs from day to day, so that the lessee may enjoy the full use of the premises.

WRIGHT J. stated the facts and continued: The question I have to decide turns upon the construction of the covenant contained in the lease of the premises in question by which the lessor undertakes to keep the exterior in repair. The law is well established that under such a covenant the

(1) L. R. 6 Ex. 25, 31.

lessor is not liable unless he has received notice of want of repair. Mr, Shakespeare contends that the general proposition laid down in *Makin* v. *Watkinson* (1) is as absolute as if the implied condition were written out in unqualified terms in the lease, and further, that the lessor is under no obligation in respect of the non-repair until after the lapse of a reasonable time enabling him to execute the repairs of which he has had express notice. Mr. Hilbery, for the lessee, wants to import two qualifications into the general proposition. He says, first, that the notice, to satisfy the condition, may be any notice of want of repair, and that it need not specify the precise degree of non-repair. Secondly, he says, that if the lessor has actual knowledge of the necessity for repair that fact dispenses the lessee from giving notice, especially where the lessee has himself no knowledge of the exact degree of non-repair, and the lessor has a right of entry to inspect and repair. A further question of law falls to be considered—namely, whether, if the dangerous condition of the premises cannot be remedied except after some delay, but the premises can be made temporarily safe by being shored up till the permanent repairs can be effected, the lessor is bound to put the premises into a temporary state of repair. Mr. Hilbery contends that the lessor is so bound, because, as he says, the covenant, which runs from day to day, requires the premises to be in repair and so available for the use of the lessee.

In the present case the notice given by the letter of April 2 did not treat the non-repair as an urgent matter or a matter of danger, for the simple reason that the lessee was unaware that there was any danger. All that the letter said was that the steps required attention. In my opinion that notice was sufficient to put the lessor upon inquiry and to impose upon him the obligation of ascertaining the extent of the non-repair and of taking the necessary steps to remedy the defect. That being so, quite apart from the further question of actual knowledge relied upon by Mr. Hilbery, a breach of covenant has in my judgment been made out. No case has

(1) L. R. 6 Ex. 25.

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been cited to me, nor have I found one, where this point has been considered by the Court; but, looking at the reason of the thing, I hold that the condition has been satisfied. I so decide, in the absence of direct authority, upon the principles laid down in cases like *Makin* v. *Watkinson* (1), and in the light of the full discussion in *Murphy* v. *Hurly*. (2) If I am right in so deciding, Mr. Shakespeare prays in aid his point that a reasonable time must be allowed the lessor for doing the repairs, within which period, he says, must be included the time necessary for an examination of the premises, and then taking the necessary steps in getting builders and others to execute the repairs. He says that a reasonable time had not expired by the date the accident happened to the lessee. Mr. Shakespeare also contends that no obligation rested upon the lessor to do temporary repairs. In my judgment the lessor's obligation comes into effect as soon as he has sufficient notice of the non-repair. Having regard to the terms of the letter of April 2 the lessor in my judgment was not liable for breach of covenant until he had been able to ascertain the nature of the repairs required. This he knew by April 8, and I think he acted at his peril if he did not at once remedy the non-repair, either by temporary measures, if the permanent repairs could not be immediately effected, or by doing the permanent repairs, if this was practicable. If he did not do this he committed a breach of covenant.

If I am wrong in holding that temporary repairs are necessary where the permanent repairs cannot be carried out immediately, I think that by April 14 a reasonable time had elapsed for doing the repairs, or, to put it more correctly, that by that date there had been a failure to proceed with the repairs with reasonable despatch. On that point therefore I reject Mr. Shakespeare's contention of fact.

Mr. Hilbery's alternative contention is that even if the letter of April 2 may be disregarded as not being express notice of the particular non-repair complained of as a breach of covenant, the lessor is nevertheless not entitled to say

(1) L. R. 6 Ex. 25. (2) [1922] 1 A. C. 369.

that he was not breaking his covenant, because, having regard to the facts, he had actual knowledge of the non-repair, and under the letter of April 2 had a right of entry on the premises by virtue of which right he ascertained as a fact that a part of the structure was dangerous. Applying the principle cessante ratione legis cessat ipsa lex, Mr. Hilbery says that the condition implied in a covenant like this becomes immaterial if the lessor has actual knowledge of the non-repair and a right of entry under which he can deal with it. There appears to be no express authority upon this point. The matter might arise if when doing repairs to a house the lessor by his agents, the builders, who are actually in the house, notice some further defect in the structure requiring immediate attention of which the lessee is not aware. In such a case the lessor who, through his builders actually on the premises, is aware of the defect, is not in my opinion entitled to defend himself in an action for breach of covenant for not doing those repairs merely on the ground that he had had no actual notice from the lessee. I am quite aware of the dicta which seem to show that the implied condition is one which can only be satisfied by express notice from the lessee and not by express notice aliunde. I may refer to the dictum of Brett M.R. in *Hugall* v. *M'Lean* (1), where he said this: "I doubt whether, if the landlord had notice aliunde, he would be liable, but it is not necessary to decide this. If he were told by a neighbour that the premises were out of repair it might happen that he would be unable to enter." To the same effect were the observations of Warrington J. in *Torrens* v. *Walker* (2): "It is not necessary to decide whether the notice must come from the tenant, but I think that it must be from the tenant, and not aliunde." In *Murphy* v. *Hurly* (3), Lord Sumner, referring to *Hugall* v. *M'Lean* (1), where the finding of the jury was that the tenant did not know and had not the means of knowing of the defect, and that the landlord had the means of knowledge but not actual knowledge, said (4): "It would appear from the

(1) 53 L. T. 94.
(2) [1906] 2 Ch. 166, 172.
(3) [1922] 1 A. C. 369.
(4) [1922] 1 A. C. 389.

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report in 1 Times L. R. 445 that the Court felt that it was carrying the rule to its extreme limit." Lord Sumner in *Murphy* v. *Hurly* (1) also summed up the position in this way: "In *Tredway* v. *Machin* (2) the Court of Appeal held, following *Hugall* v. *M'Lean* (3), that means of knowledge are not equivalent to actual knowledge for the purpose of charging the landlord." In the present case there was not only actual knowledge on the part of the lessor, but actual knowledge acquired by a notice from the lessee drawing attention to the fact that a certain part of the structure required attention. Coupled with that, the lessor had a right of entry to examine into the condition of the premises and to do necessary repairs. The difficulty does not therefore seem to me to exist in this case, and I hold as a matter of law, if it be necessary in the circumstances, and assuming that the letter of April 2 cannot be relied upon by the lessee as express notice of non-repair, that the actual knowledge acquired by the lessor of the non-repair prevents him on the facts of the case setting up in answer to the lessee's claim the answer that express notice of the actual non-repair was not given to him.

In my opinion therefore the lessee is entitled to succeed, and there will be judgment in his favour for 1200*l.*

Judgment for lessee.

Solicitors for lessee: *Maples, Teesdale & Co.*
Solicitor for lessor: *F. J. Berryman.*

(1) [1922] 1 A. C. 369, 389. (2) 91 L. T. 310.
(3) 53 L. T. 94.

J. S. H.

[IN THE COURT OF APPEAL.]

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Workmen's Compensation—"Arising out of and in the course of the employment"—Workman sending Lad employed with him to fetch his Brother's Hammer from another Owner's Pit—Accident to Lad at other Pit—Workman's attempted Rescue—Death of Both—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 7—*Coal Mines Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 110.

J., together with G. and S., was employed upon brickwork in a pit belonging to the respondent, who supplied all the tools. J. was in charge of the job, and being in need of a bricking hammer, sent G. and S. to a neighbouring pit, belonging to H., to fetch a hammer belonging to J.'s brother. S. let G. down H.'s pit. G. found the hammer, but when S. was winding up the bucket, G. was overcome by noxious gas and fell out of it. S. immediately fetched J., who went down H.'s pit to rescue G., but he, too, was overcome by the gas, and both he and G. lost their lives. J.'s daughter claimed compensation, and the county court judge awarded her damages:—

Held, that in giving the order to G. and S., and in acting as he did, J. had himself stepped outside the sphere of his employment; that he exposed himself to a risk unconnected with his employment and to which he was not employed to expose himself; that G. being at the moment a stranger to the common employer, it was not a case of emergency to a fellow workman so as to render the act of J. an act in the course of his employment; and that the applicant was not entitled to recover compensation, inasmuch as the accident did not arise out of and in the course of J.'s employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906, and was therefore one to which s. 7 of the Workmen's Compensation Act, 1923, did not apply.

APPEAL by the respondent from an award of the judge of the Madeley, Shropshire, County Court in favour of the applicant.

The facts are stated in detail in the following judgment of the Master of the Rolls.

Edgar Dale and *W. R. Howard* for the appellant. The accident did not arise out of and in the course of the employment, but it happened in an adjoining mine, which did not belong to the appellant, and was entirely outside the scope of the employment. Neither s. 7 of the Act of 1923, nor s. 110 of the Coal Mines Act, 1911, therefore applies. The

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latter section would only apply if the accident had happened in the appellant's pit, whereas it occurred in Harriman's. The former section does not bring within s. 1 of the principal Act cases where the accident does not arise out of and in the course of the employment at all: *Borley* v. *Ockenden.* (1) Jones was not under any obligation or necessity to give the order which was the primary cause of the accident: *St. Helen's Colliery Co.* v. *Hewitson.* (2)

Joy K.C. and *J. P. Haslam* for the respondent. We do not contend that s. 110 of the Coal Mines Act, 1911, applies, because the death did not occur in the appellant's pit; but s. 7 of the Act of 1923 applies. In going to the rescue of Gears, Jones was doing an act for the purposes of and in connection with his employer's trade or business. Jones was in charge of the job, and in giving orders to his fellow workmen to go and get him a hammer, he was acting within his employment. He was at any rate "acting without instructions" within the meaning of s. 7. Gears had to obey his superior's orders: *Geary* v. *F. Ginzler & Co.* (3); *Risdale* v. *Owners of S.S. Kilmarnock* (4); and his condition was due to the employment arising out of his contract of service. That being so, Jones in going to save him was acting under the implied terms of his employment: *Upton* v. *Great Central Ry. Co.* (5); *Davidson & Co.* v. *McRobb.* (6) In *Borley* v. *Ockenden* (1) Borley was not even working on his employer's premises, and *Barnes* v. *Nunnery Colliery Co.* (7) was a case of "added peril." Both those cases are distinguishable.

Further, even if what Jones did was outside the scope of his employment, he was brought back within it by reason of the emergency: *Rees* v. *Thomas* (8); *Culpeck* v. *Orient Steam Navigation Co.* (9); *London and Edinburgh Shipping Co.* v. *Brown.* (10) When Jones knew of the accident and went

(1) [1925] 2 K. B. 325; 18 B. W. C. C. 55.
(2) [1924] A. C. 59.
(3) (1913) 6 B. W. C. C. 72.
(4) [1915] 1 K. B. 503.
(5) [1924] A. C. 302.
(6) [1918] A. C. 304.
(7) [1912] A. C. 44.
(8) [1899] 1 Q. B. 1015.
(9) (1922) 15 B. W. C. C. 187.
(10) (1905) 42 S. L. R. 357.

to the scene, he was doing something which he had to do by reason of his employment. Gears had gone to the pit in obedience to the orders given by Jones, and in doing so was acting in, and never went outside of, his employment. In emergency cases incidents or exigencies are quite immaterial, and the fact that this emergency had nothing whatever to do with the bricking job does not matter.

There are facts which support the award, and even if the arbitrator has not based his finding on those facts, we submit that the Court should uphold the award: *Brinckman* v. *Harris*. (1) If the facts have not been found then the case should go back to have them found.

Howard in reply.

POLLOCK M.R. This is a difficult case, as all cases are which have to be determined on the question whether the accident arises out of and in the course of the employment. It is not less difficult because in the particular circumstances our sympathies are not unnaturally engaged in favour of the applicant who has lost her father, William Jones.

The facts, to which some attention is necessary, are these. The deceased, William Jones, was employed at a little shaft, which is quite shallow, I think it is only twenty-four feet deep, and he was employed at this shaft with two other men, one named Smith and the other a lad named Gears, who was the adopted son of William Jones, the deceased. They were employed by the respondent Tarr at this pit, which belonged to him, to brick in the inset of the shaft, and they were five yards down on a scaffolding. Tarr the employer supplied all the tools. It appears that in the course of the work and while William Jones was engaged upon this brickwork he found himself without a bricking hammer. In the neighbourhood not far away, only fifty yards, there was another pit, which belonged to a man named Harriman. William Jones' brother, Thomas Jones, was employed by Harriman in that pit, and the probability was that Thomas Jones would also

(1) (1916) 9 B. W. C. C. 200.

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have a bricking hammer. William Jones, therefore, when engaged in respondent's pit, told his fellow workman Smith to take the young lad Gears to Harriman's pit and see if he could get the bricking hammer which belonged to William Jones's brother. Smith and Gears went to Harriman's pit and Smith let Gears down. Before doing so he made no examination to see whether there was noxious gas in the form of monoxide or after damp in Harriman's pit. Gears found the bricking hammer in the pit, got himself back into the bucket, and was in the course of being wound up again by Smith when he tumbled out of the bucket owing to being overcome by the fumes at the bottom of Harriman's pit, and thereupon Smith, realizing the danger in which the lad was placed, ran back to William Jones, who was still at the respondent's pit, and told him what had happened. William Jones thereupon ran over to Harriman's pit, and got Smith to let him down for the purpose of trying to save his adopted son. When William Jones got to the bottom of Harriman's pit he fixed a rope round Gears' body, but after he had done that he himself was overcome by these noxious fumes, with the result that he, as well as the lad Gears, lost their lives from the after damp at the bottom of Harriman's pit.

Evelyn Maud Jones, the daughter of William Jones, has made an application for an award under the Workmen's Compensation Act against Tarr, the owner of the first pit, on the ground that she is a dependant and entitled to compensation for the loss of her father, whom she says died from an accident which arose out of and in the course of the employment of her father by the respondent Tarr. The question is whether the accident arose out of and in the course of the employment, and that was agreed to be the question before the learned county court judge, who came to a conclusion favourable to the applicant. The damages were agreed, and the question before us is whether or not there is evidence which will justify the county court judge in his finding of fact, and whether he has rightly directed himself in law. We have had the advantage of an excellent

argument on both sides in this case, but I have come to the conclusion that the applicant must fail.

I do not think that this is a case which really raises the problems which arise under s. 7 of the Act of 1923. That section was passed, as we have in this Court already pointed out, in order to bring back within the ambit of s. 1, sub-s. 1, of the Act of 1906 certain cases which have been held in numerous instances no longer to remain within the ambit of s. 1, by reason of the fact that there had been some disobedience of a statutory or other regulation or other incident which took the workman outside the sphere of his employment, and so prevented him from being entitled to receive the compensation which would otherwise have been given to him by s. 1 of the Act of 1906. I say again, as I said in the course of *Davies* v. *Gwauncaegurwen Colliery Co.* (1), that, first of all, it is important to see whether the case does fall within the ambit of s. 1 of the Act of 1906. Sect. 7 of the Act of 1923 is ancillary to s. 1 of the Act of 1906. It is in terms to be read with the section of the principal Act, and it begins with the words: "For the purposes of the principal Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment"; that is to say, shall be deemed to be within s. 1, notwithstanding certain incidents which are thereafter specified. It is plain to my mind that s. 7 has to be treated as intended to bring back into s. 1 cases which would otherwise upon the decisions have been taken outside it. In my judgment the present case does not require us to make use of, nor is it possible to make use of, s. 7, because the applicant was not at the time of the accident within the ambit of s. 1 at all.

It appears to me that it would be going far beyond any reported decisions if it was held that the evidence in the present case showed that what had been done was a part of and within the employment of William Jones by Tarr. I will refer to two well known cases upon this question. In

(1) [1924] 2 K. B. 651.

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Barnes v. *Nunnery Colliery Co.* (1), the judgment in which in the House of Lords is referred to again with approval in the later case of *Plumb* v. *Cobden Flour Mills Co.* (2), Lord Atkinson says: "In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment." That distinction, which is developed in other judgments or speeches and in other cases, must still be regarded as the primary test. In *Plumb* v. *Cobden Flour Mills Co.* (3) Lord Dunedin says this in the course of the argument: "If you cannot show that Plumb was entitled, in the carrying out of his work, to adopt this plan, you cannot win." That was a case in which Plumb adopted the method of using the power shaft to haul up certain bundles he was employed to stack in a certain place. Lord Dunedin, in giving his judgment in that case, which has been referred to over and over again as stating the true law, puts it in this way: "The fallacy of this consists in not adverting to the fact that there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." Applying that to the facts of the present case, how was it that Gears got into Harriman's pit? It appears to me that he did so because he was sent by William Jones, but William Jones sent him not on the employer's business, not within the sphere of his employer's business; he was not sent to find the hammer which had been supplied by Tarr, he was sent by William Jones in the hope that if he went to a wholly independent pit he would be able to borrow from William Jones' brother a hammer which William Jones anticipated

(1) [1912] A. C. 44, 49; 5 B. W. C. C. 195, 200.

(2) [1914] A. C. 62; 7 B. W. C. C. 1.

(3) 7 B. W. C. C. 1, 3.

his brother would be able to give him. Testing it in that way, it appears to me impossible to say that in the carrying out of that mission William Jones was entitled to exercise his authority, as a workman in the employ of Tarr, upon Gears for the purpose, or that he was, by giving that order to Gears, entitled to enlarge the sphere of Gears' employment, so that Gears at the time he went to fetch William Jones' brother's hammer could be said to be still acting within the employment of Tarr. It appears to me that William Jones for his own purposes and perhaps exercising authority over his adopted son was, at the time when he sent the lad off on the mission, going right outside the sphere of employment of both himself and of the lad Gears, and it is at that time that I think the break in causation occurs. It is not possible in the right application of the cases to say that the lad Gears, or that William Jones, in giving that order to the lad, was acting within the sphere of the employment of them by Tarr, and if that be so, it really decides the case. It is not a case where one has to determine whether William Jones was brought back into the employment by s. 7, through having merely disregarded some instructions or acted without instructions in a matter which was for the purposes of and in connection with his master's business, because, in the reasoning which I have applied to this case, it appears to me that, in giving the order to Gears and in acting as he did, he had himself stepped right outside the sphere of his employment.

That also makes it unnecessary to deal with the point on which Mr. Joy, rightly enough, dwelt—namely, that an emergency had arisen, with the consequences ensuing from that state of things. The doctrine is laid down in *Rees* v. *Thomas* (1), and numerous other cases. I will only add this on the question of emergency that, although it may well be that a workman is still to be deemed to be acting in the course of his employment, and that an accident which he then suffers arises out of his employment, yet where the emergency is foreign to the employment

(1) [1899] 1 Q. B. 1015.

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by his employer, it was necessary for the purpose of bringing that accident within the Workmen's Compensation Act and enabling the workman who suffers the accident to claim compensation, that a section of an Act of Parliament should be passed. So by sub-s. 2 of s. 110 of the Coal Mines Act, 1911, it is provided that "any workmen engaged in any rescue work or ambulance work at a mine shall, for the purposes of the Workmen's Compensation Act, 1906, be deemed while so engaged to be employed by the owner of the mine." It is to be observed, therefore, that the section, needed to enable persons who suffer an accident in rescue work to fall within the Workmen's Compensation Act, provides that the liability shall be fixed on the owner of the mine where the rescue work takes place, which, in this case, would be Harriman's pit and not the pit of the respondents.

I want to say just a word about the judgment which has been given in the case. It is a careful judgment given by His Honour Judge Ivor Bowen who, in this case as in other cases, devoted great attention to the matter. In my opinion he is wrong in saying that s. 1 of the Workmen's Compensation Act, 1906, must be read with s. 7 of the Act of 1923, because I gather from the subsequent parts of his judgment that he, so to speak, reads the two sections together, whereas, as I have already pointed out, s. 1 is the primary section, and must be fulfilled first before s. 7 comes in to modify the difficulties in the way of the workman's claim under s. 1 of the Act of 1906. In my judgment there is no evidence on which he could come to the conclusion that either the lad Gears or William Jones was acting in the course of the employment by Tarr when they did what they did at Harriman's pit. There is another passage where he says that he finds that in attempting to rescue Gears from death the deceased man was doing an act which, although done without instructions from his employer, he did for the purpose of and in connection with his employer's trade or business, and it had been shown to be done bona fide in the employer's business as well as in the interests of the employer. I think that involves some confusion of thought. Before such a

finding could take place it would have to be found that the action of Jones and Gears was done by both of them in the course of their employment; that they failed to be entitled to recover, because they were acting contrary to some instructions which had been given; and then, that by virtue of s. 7 of the later Act, they were brought back into employment within s. 1 of the principal Act. I do not think the learned county court judge's judgment can stand, as it appears to me that he has based his finding of fact on materials which were not available to him, and that he has misdirected himself in the law applicable to the question. For these reasons the appeal must be allowed with costs.

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WARRINGTON L.J. I am of the same opinion. The unfortunate workman in this case lost his life in the performance of a most meritorious act, that of attempting to rescue a boy who had become overpowered by fire damp at the bottom of one of the small coal pits in this neighbourhood. One cannot help feeling great sympathy with the workman and his dependants, but the question we have to determine is whether the death of the unfortunate man gives rise to a claim against his employer for compensation to the dependant. The learned county court judge has found that the dependant is entitled to compensation, because the accident which happened to the workman must be deemed to have arisen out of and in the course of his employment by virtue of s. 7 of the Act of 1923. He says in terms that, "being of opinion that s. 7 of the Act of 1923 and s. 110 of the Coal Mines Act, 1911, apply to the case, I make an order in favour of the applicant." I may at once get rid of s. 110 of the Mines Regulation Act, because it is quite clear when the second sub-section, which alone can by any possibility have any application to the case, is read, that the learned county court judge has made a mistake; the sub-section has nothing whatever to do with this case. The sub-section provides in effect that when a man is employed in rescue work in a mine he shall be deemed for the purpose of the Workmen's Compensation Act to be employed by the owner

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of the mine, that is the mine where the rescue work is being done. In this case the employer was not the owner of the mine where the rescue work was attempted.

The facts of the case are very short. [His Lordship stated the facts and continued:] The first question that arises is: is s. 7 of the Act of 1923 applicable to this case at all? That section has been construed in two cases which have come before the Court since it was passed, one, *Davies* v. *Gwauncaegurwen Colliery Co.* (1), which I do not propose to refer to otherwise, and the other is the more recent case of *Borley* v. *Ockenden.* (2) In my opinion that last case has settled that, with regard to the construction of s. 7 of the Act of 1923, an action on the part of a workman may under [that section be deemed to be such that, if an accident happens, such accident to arise out of and in the course of the employment must be an accident within the employment, or which would be within the employment, but for the prohibition or the absence of instructions referred to in the section, and that if independently of any such prohibition, or instruction or absence of instruction, it would be outside the employment, then the section has no application to it. I think that is made perfectly plain by all the judgments of the learned judges (the Master of the Rolls, Scrutton L.J. and Sargant L.J.) who heard that case, but in particular I desire to refer to one or two passages in Scrutton L.J.'s judgment where he says this: "I am unable to extend the section to a case where the workman was not acting in the course of his employment at all; where he was doing something which he was not employed to do, at a place where he was not employed, and at a time when he was not under the orders of the employer, and therefore I prefer to restrict s. 7 to cases where he is acting in the employment, though doing an act which is against statutory regulations or against orders." Again, when dealing with the facts of that case, he says: "But in my opinion s. 7 can only apply to protect the workman where he is doing work which prima facie he

(1) [1924] 2 K. B. 651.
(2) [1925] 2 K. B. 325, 333, 335; 18 B. W. C. C. 55.

is employed to do, at the time when, and at the place where he is employed to do it." Then after stating the facts he goes on: "This boy was repairing boots by sewing, which he was not employed to do; he was doing it at home, where he was not employed, and during hours when the employer was not paying him and had no right to control his services. I cannot think that s. 7 can apply to such a case." Then the Master of the Rolls also says: "In my opinion you cannot read the inclusion under s. 7 of acts formerly barred under the three categories as comprehending the doing by the workman of an act not within his employment at all, and it does not matter that he may have done it 'for the purposes of and in connection with his employer's trade or business.'" In the view I take of this case the act which this unfortunate workman was doing, and which resulted in his death, was an act which was not within his employment at all, and was quite independent of instructions or absence of instructions on the part of his master, and was altogether outside that which his master had employed him to do. To read just one passage from the speech of Lord Atkinson in *Barnes* v. *Nunnery Colliery Co.* (1), where he says, after referring to certain examples which he invents for himself of a servant, for example, being sent to walk across a footpath or going by road to a post office, and in another case instead of going to the post office takes his master's horse and rides across country and so on, says with regard to these examples: "These were altogether outside the scope of his employment. He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it."

I can put aside for the moment the contention on the part of Mr. Joy in the course of his able argument as to emergency, and just consider what it really was that this man had done. He had, by his own act, as I think clearly an

(1) [1912] A. C. 44, 50; 5 B. W. C. C. 200.

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unauthorized act, sent the boy to a place not within the physical scope of his employment, but to a place belonging to a person other than the employer, where he met with the accident which resulted in his death. Having done that, he also left the place where he was employed, went to this neighbouring pit where he was not employed, and there in attempting to rescue the boy Gears met with the accident which resulted in his own death. It seems to me that stated in that way it is in accordance with the facts, and that the man was doing something which was altogether outside the scope of his employment, was exposing himself to a risk to which he was not employed to expose himself, a risk unconnected with the employment—I will say a few words about that later—and which neither of the parties to the contract of service can reasonably have contemplated as belonging or as incidental to his employment.

Then it is said, that may be so, but if he has thus left the actual sphere of his employment in an emergency and with a view of saving a fellow servant of his master's that may be incidental to his employment and not be outside the scope of it. As I have already said I think this act was, and I must therefore consider that contention. I do not think it could be contended, and in fact Mr. Joy did not contend, that if Gears had been a mere stranger to the employment, supposing he had been this man's brother who had been employed there at the day the man was overcome by fire damp, I do not think it was contended that it would have been incidental to William Jones' employment for him to leave it and go to the neighbouring pit with a view of saving the life of a workman of another employer. The whole question then turns upon the further question whether Gears was a fellow workman of this man William Jones at the time he attempted to rescue him or whether he, Gears, had himself passed out of the employment for the time being of the present employer. Jones was responsible for this work which he was doing for his employer, and there his responsibility and his authority, in my opinion, ended. What he did was to give an order which was altogether outside that responsibility

and authority by telling the boy and Smith to go to this other pit, which, incidentally, was admittedly dangerous to go down without precautions and which he had no right to enter without the permission of the owner of it, to get this hammer, to the possession of which he had no right either, and to use it for the purpose of the job. It seems to me that the giving of the directions to Smith was something which we cannot infer that Jones had a right to do, and that in giving such directions he could not have enlarged the scope of the boy's employment and, therefore, the boy in going down that neighbouring pit was for the time being out of the master's employment. If so, the emergency which occurred was not an emergency to a fellow workman, but an emergency to a person who at this moment was a stranger to the common employer. It cannot I think be said—I do not think it was argued—that an emergency to a stranger to the employment could be such as would justify, or as would render the action of the workman in that emergency, an action which was in the course of his employment. The conclusion I have come to is that the injury by accident did not arise in the course of the employment, and that for the time being the man had left his employment and was doing something which his employer was not responsible for. On that ground I think that the learned county court judge has misdirected himself with regard to the application of the Act of 1923, and has come to a conclusion without evidence so far as the Act of 1923 is concerned.

I agree that the appeal should be allowed.

SARGANT L.J. I am of the same opinion. This is, I think, an important case, and has been extremely well argued on both sides, but in view of the elaborate and exhaustive judgments that have just been delivered I will confine my remarks within narrow limits. Everybody must have great sympathy with the dependants of a workman who has lost his life in a gallant effort to rescue another workman, but we must not, of course, give effect to that sympathy so as to impose compensation for that loss upon another person unless that

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other person is in some way liable by statute or otherwise in respect of the misfortune.

It is obvious at first sight that the chain of causation by which the applicant seeks to establish liability against the respondent is a chain which consists of many links. The applicant is a dependant of William Jones, who lost his life. William Jones lost his life in endeavouring to save his adopted son Gears, who was poisoned by after damp in a pit not belonging to the respondent Tarr at all, but to a totally different person entirely unconnected with Tarr. The way in which Tarr, the owner of the other pit, is sought to be made liable is this. Gears was employed with William Jones to repair the shaft at Tarr's pit, and William Jones, for the purpose of getting a hammer to help him in that employment, sent Gears without any authority to Harriman's pit to search for a hammer, which William Jones knew or thought his brother Thomas Jones had left in Harriman's pit. Then it is said that because William Jones was employed by Tarr to mend Tarr's pit and Gears his adopted son was also employed to mend that pit, therefore Gears was a fellow workman of the deceased William Jones at the time when he was overcome by gas in Harriman's pit, and that, within the emergency cases, liability was cast on Tarr for the death of William Jones in seeking to rescue Gears. But in order that the liability may be established every link of the chain must hold, and, without discussing all the emergency cases, it seems to me that the link that fails is the link which shows or which is to establish that Gears, at the time when he was overcome by gas in Harriman's pit, was a fellow workman of William Jones in the sense that he was acting within the scope of his employment by Tarr.

It is clear that William Jones, a man named Smith, and Gears were employed by Tarr for one specific purpose—namely, to repair some brickwork in Tarr's pit—and Tarr had to supply all the tools for that purpose. That is found by the learned county court judge. William Jones finds when repairing the brickwork that he wants a bricking hammer. He was quite at liberty either to go himself or to send Gears

to Tarr for the purpose of asking him to supplement that deficiency, and if in the course of that journey Gears had met with some accident or misfortune, it seems to me that Gears would have been acting within the scope of his employment; the accident would have arisen out of that employment, and accordingly Gears would have been a fellow workman of William Jones, so that all the later consequences for which Mr. Joy contended would have followed. But although William Jones might quite properly have sent Gears to get the tool from Tarr who had to supply the tools, it is quite a different thing to say that William Jones was entitled to tell Gears to go to an adjoining pit entirely off the property oi the employer, and to get himself let down into that pit for the purpose of getting a tool belonging to William Jones' brother. That seems to me to be something which William Jones himself could not have done within the scope of his employment, and which he could not authorize Gears to do within the scope of his employment; and if that is so, the result follows that Gears was not at the time when he was overcome by gas acting within the scope of his employment by Tarr, and was not a fellow workman of William Jones for the purposes of the application of the emergency risk cases.

There is one other matter I should wish to touch upon, and that is this. The learned county court judge seems to me to have thought in some way that s. 7 of the Act of 1923 enlarged the prima facie scope of s. 1 of the Act of 1906. In my judgment that is not so, and that is clearly pointed out in the recent case of *Borley* v. *Ockenden* (1), which has been referred to. The effect of a number of cases had been to exclude from the general prima facie area of s. 1 of the Act of 1906 a number of cases which appeared to fall prima facie within it, but which were held to be excluded by reason of there being some statutory prohibition, or some express prohibition by the employer, or something of that kind. And the aim of s. 7 of the later Act was in my view only to put an end to the exclusion of those cases by reason of any of those special circumstances. It seems to me to have no

(1) [1925] 2 K. B. 325; 18 B. W. C. C. 55.

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effect at all for the purpose of enlarging the general prima facie effect of s. 1, and therefore leaves it as a necessary requisite to be established by the workman claiming compensation or his dependants that the accident arose out of and in the course of the employment.

I agree the appeal should be allowed.

Solicitors for appellant: *F. J. Berryman, for T. Haynes Duffell, Birmingham.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for R. A. Willcock, Taylor & Co., Wolverhampton.*

R. M.

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July 24, 28.

DALEY *v.* LEES.

Local Government—Public Health—Common Lodging House—Registration—No Letting for less than a Week—Towns Improvement Clauses Act, 1847 (10 *&* 11 *Vict. c.* 34), *s.* 116—*Common Lodging Houses Act,* 1851 (14 *&* 15 *Vict. c.* 28)—*Common Lodging Houses Act,* 1853 (16 *&* 17 *Vict. c.* 41)—*Common Lodging Houses* (*Ireland*) *Act,* 1860 (23 *&* 24 *Vict. c.* 26)—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 76, 77—*Public Health* (*Ireland*) *Act,* 1878 (41 *&* 42 *Vict. c.* 52), *s.* 294.

The decision of the Court of Appeal in *Parker* v. *Talbot* [1905] 2 Ch. 643 as to the meaning of a "common lodging house" applies not only to London where the Common Lodging Houses Acts, 1851 and 1853, are still in force, but also to towns, as to which those Acts are repealed and the Public Health Act, 1875, alone is in force. A house in which poor persons are lodged for payment and live in common is not a common lodging house unless some part of it is let for less than a week at a time.

CASE stated by Blackburn justices.

An information was preferred on January 20, 1925, by the appellant, William Daley, Medical Officer of Health for the county borough of Blackburn, under the Public Health Act, 1875, against Frank Lees, the respondent, for that he did on January 8, 1925, unlawfully receive lodgers in a certain common lodging house situate at 16 Bradshaw Street there, without having registered the said house as required by the Public Health Act, 1875. This information was heard

by the justices in petty session on February 20, 1925, and dismissed.

Upon the application of the appellant the justices stated this case for the opinion of the Court.

Upon the hearing of the information the following facts were admitted or proved:—

(*a*) The respondent was the owner and occupier of premises situated at 16 Bradshaw Street, and on the date of the offence he had as lodgers on his premises six women, all of the poorer class, most of them being pensioners.

(*b*) The lodgers used one common room for their meals and lived together in this room. The furniture in the room consisted of two tables and three forms, and there were lockers for keeping food.

(*c*) The house contained three bedrooms, but only two were used by the lodgers, in one room five beds and in the other three beds.

(*d*) The lodgers found their own food and each paid 5*s*. a week in cash for their accommodation, and they paid weekly. They had been lodging there continuously for over three months.

(*e*) The Medical Officer said that when he visited the house he found no difference in management between this house and any common lodging house. The structure was poorer and not equal to the ordinary common lodging house.

(*f*) It was admitted that the house had not been registered as a common lodging house.

The appellant contended that on these facts the premises were a common lodging house and should be registered under the Public Health Act, 1875, s. 76.

The respondent contended that inasmuch as the lodgers had been there continuously for a period of over three months, and were each paying weekly a sum for lodgings, the premises did not fall within the meaning of a common lodging house under the said Act and consequently did not require to be registered under the Public Health Act, 1875.

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The following statutes and cases were cited: the Towns Improvement Clauses Act, 1847, s. 116; the Common Lodging Houses Act, 1851; the Common Lodging Houses Act, 1853; the Common Lodging Houses (Ireland) Act, 1860; the Public Health Act, 1875, ss. 76–89; *Broadbent* v. *Langdon* (1); *Logsdon* v. *Booth* (2); *Logsdon* v. *Trotter* (3); *Parker* v. *Talbot* (4); *London County Council* v. *Hankins.* (5)

The justices were of opinion that the premises did not fall within the meaning of the term "common lodging house" under the Public Health Act, 1875, and therefore they dismissed the information. The grounds for their determination were set out in the following judgment, which formed part of the case:—

The question submitted to us is admittedly a difficult one, because the Public Health Act, 1875, does not define what constitutes a "common lodging house" under the Act. We are therefore driven to find if possible the right interpretation from several Acts preceding the 1875 Act and from the various judgments in the cases in which the subject had been discussed. The Towns Improvement Clauses Act, 1847, gives a definition of a "public lodging house" as "a house in which persons are harboured or lodged for hire for a single night or less than a week at one time or any part of which is let for any term less than a week." This Act was followed by the Acts of 1851 and 1853, in neither of which is there any definition of a common lodging house. At this period, 1853, owing evidently to the want of a clear definition, the law officers of the Crown were asked to advise the General Board of Health as to a definition, and they advised as follows: "It may be difficult to give a precise definition of the term 'common lodging house,' but looking to the preamble and general provisions of the Act (14 & 15 Vict. c. 28) it appears to us to have reference to that class of lodging house in which persons of the poorer class are received for short periods, and though

(1) (1877) 37 L. T. 434.
(2) [1900] 1 Q. B. 401.
(3) [1900] 1 Q. B. 617.
(4) [1905] 2 Ch. 643.
(5) [1914] 1 K. B. 490.

strangers to one another are allowed to inhabit one common room." It was evidently thought that even this definition was not sufficiently precise, as the law officers added at a later period the further opinion "That in their opinion the period of letting is unimportant in determining whether a lodging house came within the Act."

This was the position in 1853, and had it been left there and had the owners of such premises been willing to accept the dictum of the law officers little difficulty would have arisen. It seems, however, that the Acts of 1851 and 1853 applied only to England, and it was thought advisable to extend them to Ireland. Accordingly in 1860 an Act which we will call the "Irish Act" was passed extending the provisions of the 1851 and 1853 Acts to Ireland. It is evident, however, that certain doubts and difficulties had arisen under the 1851 and 1853 Acts, and it was stated in the Irish Act that these doubts and difficulties were to be explained and removed in the new Act so far as it applied to Ireland. One of the explanations in the Act was the definition of a "common lodging house," and in s. 3 it is given as "a house in which persons are harboured or lodged for hire for a single night or for less than a week at a time, or any part of which is let for any time less than a week." It will be seen that this definition is identical with the definition of "a public lodging house" in the Act of 1847. This was the position in 1875 when the Public Health Act, 1875, under which this prosecution was taken, was passed. This Act repealed the other Acts, but unfortunately failed to give any definition of what constituted a "common lodging house." This defect accordingly has caused the question to become one of doubt and discussion not only with regard to the ordinary owners of lodging houses but also with regard to charitable institutions who were providing lodging houses out of pure charity. And it is from the cases dealing with these doubts that we are left to try and gather what the interpretation now is. In 1906 the matter was fully discussed in the case of *Parker* v. *Talbot* (1) in the Court

(1) [1905] 2 Ch. 643.

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of Appeal, and it became necessary for the Court to deal with the definition of "a common lodging house," and the Court in their judgment came to the conclusion that the definition in the Irish Act not only applied to Ireland, but that it explained the Acts for the interpretation in England. The question came up for further discussion in 1914 in the case of *London County Council* v. *Hankins*. (1) It is true that the prosecution in this case was under the London County Council (General Powers) Act, 1902, but that does not affect the matter in regard to the question we are considering. Channell J. in his judgment said in dealing with the definition of a "common lodging house" that the Court was bound by the definition as stated by the Court of Appeal in *Parker* v. *Talbot* (2), and Atkin J. was even more explicit, and said: "The effect of the case of *Parker* v. *Talbot* (2) to my mind is to add two elements, it adds to the definition, first, that the lodgings are to be lodgings for hire, and secondly, it defines the short period mentioned in the law officers' definition to the extent of a single night or less than a week at a time, which is the period mentioned or what has been called the statutory definition." It seems clear from this dictum that the opinion given by the Law Officers of the Crown in 1853 was right so far as the class of persons lodging and as to their living in common was concerned, but that the "short period" they named must be limited to "less than a week" and the letting must be for hire. We hold that a common lodging house is "a house in which persons are harboured or lodged for hire for a single night or for less than a week at a time, or any part of which is let for any time less than a week." And although we think it most necessary that the corporation should have control over houses like the defendant's, yet, as the defendant's house does not come within the legal definition of "a common lodging house" we are obliged to dismiss the summons.

The question for the opinion of the Court is whether upon the above statement of facts we came to a correct

(1) [1914] 1 K. B. 490. (2) [1905] 2 Ch. 643.

determination in point of law, and if not what should be done in the premises.

F. B. Merriman K.C. and *H. Derbyshire* for the appellant.

Hon. Sir Malcolm Macnaghten K.C. and *P. B. Morle* for the respondent.

[The arguments sufficiently appear from the judgments.]

LORD HEWART C.J. This is a case stated by justices for the county borough of Blackburn, and it raises a question of no little public importance, a question which may be thought worthy of the attention of the Legislature. [His Lordship, after stating the facts, proceeded:] The case, as it is stated, manifestly accepts the evidence of the appellant on two important matters—the only matters on which his evidence is referred to: (1.) that he found no difference in management between this house and any common lodging house; (2.) that the structure was poorer, and not equal to that of the ordinary common lodging house. He contended that the house was a common lodging house. The respondent contended that inasmuch as the lodgers had been there for more than three months it was not within the definition of a common lodging house and did not need to be registered.

The justices have set out a judgment of some length in which they review the decisions, and it is clear that they considered that they were bound by the decision of the Court of Appeal in *Parker* v. *Talbot* (1), for they say: "We hold that a 'common lodging house' is 'a house in which persons are harboured or lodged for hire for a single night or for less than a week at a time, or any part of which is let for any time less than a week,'" and they add: "Although we think it most necessary that the corporation should have control over houses like the defendant's, yet as the defendant's house does not come within the legal definition of 'a common lodging house' we are obliged to dismiss the summons." Speaking for myself, I read that passage, as I read the whole case, as meaning that the justices found themselves reluctantly

(1) [1905] 2 Ch. 643.

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bound to hold, because of the decision of the Court of Appeal in *Parker* v. *Talbot* (1), that that was not a common lodging house, which if they had been unfettered they would have held to be a common lodging house.

There are ambiguities in the case, and there were moments when the Court was inclined to send the case back for a further finding. But the appellant is willing that the case should be determined on the footing that what was observed by the Medical Officer on the day named was typical, and that it was not the defendant's practice to let for less than a week certain.

One has to approach the matter on the pure question of law whether *Parker* v. *Talbot* (1) applies and governs this case. It would be possible, but I doubt whether it would be useful, to make a historical survey of the statutes and cases relating to common lodging houses. I refrain, because I am compelled to take a course and expound a view which, if the matter were open, I should not take or expound. The Towns Improvement Clauses Act, 1847, s. 116, provides: "It shall not be lawful to keep for use as a public lodging house within the limits of the special Act any house, not being a licensed victualling house, which shall be rated to the relief of the poor on a less sum than ten pounds, nor in any case unless such house shall have been registered as a lodging house in a book to be kept by the commissioners for that purpose; and every house shall be deemed a public lodging house within the meaning of this Act in which persons are harboured or lodged for hire for a single night, or for less than a week at one time, or any part of which is let for any term less than a week." It is quite obvious that that section consists of two main parts. It begins by excepting in very plain terms a licensed victualling house. It goes on to fix a minimum rate of poor rate, and then provides that certain houses shall be deemed to be public lodging houses. The words are not "shall not be deemed to be, unless . . . . ," but "every house shall be deemed to be." No one has professed that this is a complete definition of a public lodging

(1) [1905] 2 Ch. 643.

house. The highest at which the argument is put for the respondent is that no house can be a public lodging house unless it exhibits this characteristic among others. Then come the Common Lodging Houses Acts, 1851 and 1853. Neither contained a definition, and in 1853 the law officers were asked to express their opinion and emphasized two characteristics: (1.) that the house was open to all; (2.) that it was a place where persons, albeit strangers, lived together. Later, they were asked to supplement their opinion on the question of time, and said that the shortness of the time of the letting was immaterial. That was considered for many years as stating the law.

Next in order of date is the Common Lodging Houses (Ireland) Act, 1860. It has ten sections, and s. 10 says: "This Act shall extend to Ireland only." The Legislature had in mind the special case of Ireland only, and one remembers that so far as common lodging houses are concerned there may be special circumstances relating to England, or to Scotland, or to Ireland. One of the tasks which the Legislature set itself was to define those circumstances as regards Ireland. Sect. 3 provides: "For the purpose of the execution of the said recited Acts and of this Act in Ireland . . . . the term 'common lodging house' shall mean a house in which persons are harboured or lodged for hire for a single night, or for less than a week at a time, or any part of which is let for any term less than a week. . . . ." The recited Acts are the Common Lodging Houses Acts, 1851 and 1853. If it was intended by the definition just quoted to replace the definition in s. 116 of the Towns Improvement Clauses Act, 1847, the new definition is manifestly incomplete. There is no reference in it to the licensed victualling house, nor to a house not rated to the relief of the poor at less than 10*l.*

Apart from authority, therefore, one may perhaps concede that as a replacement of s. 116 of the Towns Improvement Clauses Act, 1847, the definition of common lodging house contained in s. 3 of the Common Lodging Houses (Ireland) Act, 1860, left at least something to be desired. That statute, so far as this country is concerned, seems to have lain dormant

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for the respectable period of forty-five years. Meantime many things had happened. In 1877 there had been the case of *Langdon* v. *Broadbent* (1); *Logsdon* v. *Booth* (2); and *Logsdon* v. *Trotter* (3), in which Channell J. explained the three requirements of a common lodging house. Then came *Parker* v. *Talbot*. (4) It is a little interesting to observe what the particular point of controversy was. It was whether a charitable institution amounted or did not amount to a common lodging house. The case was argued on October 24 and 25, 1905. Judgment was about to be delivered on October 30, 1905, and there can be little doubt what the judgment was going to be. But something happened to direct the Court to the Common Lodging Houses (Ireland) Act, 1860, and judgment was postponed. When it was delivered it was said in effect: "There is a definition here in the Common Lodging Houses (Ireland) Act, 1860, and one of the elements is 'hire'; and as there is no question of 'hire' here, this is not a common lodging house." Two days later it was brought to the notice of the Court of Appeal that the Common Lodging Houses (Ireland) Act, 1860, had been repealed by the Public Health (Ireland) Act, 1878, s. 294, but it was held that that made no difference. Whether the result would have been different if it had been pointed out to the Court of Appeal that while the Public Health (Ireland) Act, 1878, repealed the definition, the Public Health Act, 1875, contained no such definition for England, it is idle to speculate. Attention has been directed to *London County Council* v. *Hankins* (5), which shows that the definition in the Act of 1860 was not a complete definition. It is said on behalf of the appellant that the sphere within which *Parker* v. *Talbot* (4) is of force and effect is limited to the sphere within which the Common Lodging Houses Acts, 1851 and 1853, are still of force and effect—namely, London—and the argument submitted is that while in London you are to look for a definition of common lodging hou e within the four corners of the definition in

(1) 37 L. T. 434.
(2) [1900] 1 Q. B. 401.
(3) [1900] 1 Q. B. 617.
(4) [1905] 2 Ch. 643.
(5) [1914] 1 K. B. 490.

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Parker v. *Talbot* (1), in the provinces you are in no such difficulty, and may go back to the opinion of the law officers in 1853, and the classic judgment of Channell J. in *Logsdon* v. *Trotter*. (2) It is an attractive argument, but I am bound to say that, whatever may be the history of the judgment in *Parker* v. *Talbot* (1), it seems to me a little difficult to hold that a common lodging house is one thing in London and something quite different in the rest of the country.

Attractive, and indeed convincing, as I find the argument for the appellant from the point of view of pure reason, I am reluctantly of the opinion that the justices were right, and that the appeal must be dismissed.

AVORY J. I agree.

SHEARMAN J. The question is whether this house is a common lodging house within the Public Health Act, 1875. There is no definition of a common lodging house in that Act, but at the time it was passed the characteristics of such a house were well known. It does not appear from the authorities that it has ever been actually held that the letting must be for less than a week in order to constitute a common lodging house, but they show a strong leaning in that direction. In *Parker* v. *Talbot* (1) the Court of Appeal decided that the definition in the Common Lodging Houses (Ireland) Act, 1860, s. 3, applied also in interpreting the English Acts. But that definition was not exhaustive; the house must also comply with other requirements. The question was again discussed in *London County Council* v. *Hankins* (3), and the Court there expressed the view that *Parker* v. *Talbot* (1) did not overrule the law as laid down in the *Logsdon* cases as to the essentials mentioned in the law officers' opinion and there adopted, but only added two elements: (1.) that the lodgings are to be lodgings for hire, and (2.) that the short period of letting mentioned in the law officers' opinion be for a single night or less than a week at a time. It is said

(1) [1905] 2 Ch. 643. (2) [1900] 1 Q. B. 617.
(3) [1914] 1 K. B. 490.

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that we are bound by these cases when we are dealing with houses in the London area, where the Public Health (London) Act, 1891, and the London County Council (General Powers) Act, 1902, Part IX., prevail, but that as regards the rest of the country the only statute which applies is the Public Health Act, 1875. In my judgment the same interpretation must be given whether we have regard to the Acts of 1851 and 1853 or to the Public Health Act, 1875. Both codes contain sanitary provisions affecting common lodging houses and yet give no definition of the term. I regard both codes as substantially the same in this respect, and think we must construe a common lodging house in the same way in both cases.

Appeal dismissed.

Solicitors for appellant: *Robbins, Olivey & Lake, for Sir Lewis Beard, Town Clerk, Blackburn.*

Solicitors for respondent: *James, Mellor & Coleman, for Oddie & Roebuck, Blackburn.*

F. P. F.

1925

May 28, 29.

TURNER *v.* CIVIL SERVICE SUPPLY ASSOCIATION, LIMITED.

[1924. T. 1661.]

Carrier—Carriage of Goods—Exception of Loss by Fire—Fire caused by Negligence of Carriers' Servants—Liability of common and other Carriers.

The defendants, who were furniture removers and warehousemen, entered into a contract to remove the plaintiff's furniture from London to Hailsham. The contract was made subject to various conditions, one of which was that the defendants were not responsible for loss or damage caused by fire. The plaintiff's goods were loaded on a motor lorry, and in the course of the transit a fire caused by the negligence of the defendant's servants destroyed the bulk of the plaintiff's goods and damaged the remainder. In an action by the plaintiff to recover the value of the goods so destroyed and damaged:—

Held, that the defendants were protected from liability by the condition that they were not responsible for loss or damage caused by fire, because, not being common carriers, they were not liable for loss or

damage caused by an accidental fire, and unless the condition protected the defendants against liability for a fire caused by the defendants' negligence, it would not have any effect.

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TURNER v. CIVIL SERVICE SUPPLY ASSOCIATION.

FURTHER consideration of an action tried before Sankey J. and a special jury.

The plaintiff, Miss E. M. Turner, on May 19, 1924, entered into an agreement with the defendants, the Civil Service Supply Association, Ld., who were removal contractors and warehousemen, under which they undertook to remove her household goods and furniture from Battersea Park, London, to Hailsham in Sussex.

The contract was made subject to various conditions, of which the following are the material clauses :—

7. "The contractors shall not be responsible for loss of or damage to any article contained in drawers, or in any package or case not packed and unpacked by their employees; nor for plate, jewellery or other valuables, unless the same shall be specially given to their foreman under seal, and written notice of the value thereof shall have been received by the contractors prior to the date of removal or storage, or the commencement of the packing; nor in respect of any property not set forth and described in the warehouse inventory.

8. The liability of the contractors for any loss, failure to produce, or damage to any one article, suite, service, or package (whether delivered to the contractors' foreman or not) is limited to 10*l*. The contractors, however, are willing to effect an insurance on behalf of the customer against greater loss or damage, provided they receive instructions in writing, and the premium is duly paid prior to removal, packing, or storage.

10. The contractors will not under any circumstances be liable for any damage caused by damp (unless due to the contractors' negligence) or by moth, or for loss or damage, caused by act of God, civil commotion, invasion, war or explosion, railway accidents, marine risks, or for deterioration or deficiency in articles of a perishable nature.

11. The contractors are not responsible for loss or damage caused by fire, aircraft or bombardment to property in transit,

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in storage, or in process of being packed; but will effect insurance on behalf of the customer upon receipt of written instructions from the customer."

On June 23, 1924, the defendants' servants packed the plaintiff's goods and put them on the motor lorry in which they were to be moved from London to Hailsham. In the course of the transit a fire broke out, and the motor lorry and the bulk of the plaintiff's goods were almost entirely consumed. A portion of the plaintiff's goods were delivered to her in a damaged condition. The plaintiff in this action claimed to recover from the defendants the value of the goods not delivered and of the goods which were delivered in a damaged condition.

The defendants relied as a defence upon the terms and conditions of the contract, especially the condition that they would not be responsible for loss or damage caused by fire to property in transit.

At the trial the jury found that the fire was the result of the defendants' negligence.

Thorn Drury K.C. and *Russell Davies* for the plaintiff.

Hawke K.C. and *T. F. Davis* for the defendants.

The arguments sufficiently appear from the judgment.

SANKEY J. In this case the plaintiff's claim is for the value of goods entrusted by her to the defendants to be conveyed from London to Hailsham, and to be delivered to her there. She says that a great number of the goods were not delivered at all, and that others were delivered in a damaged condition, and she claims to recover damages for the loss she has sustained. The defendants say that they are protected by the terms and conditions of the contract of carriage. The defendants' servants packed the goods and placed them on a motor lorry. On the journey the driver stopped the motor in order to pour some petrol into the engine. At the time the engine was hot and, almost immediately, flames burst out and the motor van and its contents were almost entirely consumed by fire. At the trial the jury found that the fire

was the result of the defendants' negligence. [His Lordship, after dealing with the value of the goods, and whether particular items could be claimed for, having regard to cl. 7 of the contract, continued:] I now come to the real point of controversy in this case, that is, whether the defendants are entirely protected by the terms of the contract. That raises a question of law upon which I will give my decision. The goods were destroyed by fire, which the jury found was the result of the defendants' negligence. The clause in the contract relied upon by the defendants is cl. 11, which provides as follows: "The contractors are not responsible for loss or damage caused by fire, aircraft or bombardment to property in transit, in storage, or in process of being packed; but will effect insurance on behalf of the customer upon receipt of written instructions from the customer." Mr. Hawke, on behalf of the defendants, cited a large number of cases, and said that that clause means, and ought to be construed to mean what it says—namely, that the contractors are not responsible for loss or damage caused by fire, and therefore the contractors, the defendants, are not responsible. On the other hand, it is contended by Mr. Thorn Drury, on behalf of the plaintiff, that that is not the true meaning of the clause, but the meaning of the clause is that the defendants are not responsible for loss or damage caused by fire unless the fire is caused by the negligence of the defendants or their servants. This fire was caused by the negligence of the defendants' servants, as the jury have found, and, therefore, he says, that clause does not operate to excuse them.

Many of the cases which were cited in argument are rather remote from the consideration of the question involved, and illustrate the doctrine which, in my view of the present state of the law, is beyond controversy. There are two classes of carriers; there is the common carrier, and there is the ordinary carrier, who is not a common carrier. Different considerations apply to those different classes. In most of the cases cited to me the doctrine applicable to common carriers was involved. A common carrier is

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really an insurer; he is responsible for the safety of the goods entrusted to him in every case, except when the loss or injury to the goods is the result of the act of God, or the King's enemies. That position is described with sufficient accuracy for the present purpose by saying that the liability of a common carrier is absolute. There has been a long series of decisions; one of the most important is *Price & Co.* v. *Union Lighterage Co.* (1), which lays down the doctrine, which so far as I know has never been impugned, that if a common carrier, whose liability, as I have said, is absolute, desires to limit his liability for negligence, he must do so in express and unambiguous terms. The reason for that doctrine seems to me to be stated with the greatest clearness in the argument of Mr. Hamilton K.C. in that case. Dealing with the particular type of carrier in that case, a lighterman, he says (2): "A lighterman is, as regards carriage on the river, a common carrier, and subject to the liabilities of such as an insurer: *Liver Alkali Co.* v. *Johnson.* (3) He has therefore two sorts of liability: his liability as an insurer, and his liability for the acts and negligence of his servants. Prima facie, in clauses of this kind, it is the more onerous sort of liability, namely, for things which he and his servants cannot help, and not that for things which he or his servants can help, against which he is endeavouring to secure himself by excepting losses which can be covered by insurance." There have been a large number of cases which have followed upon and since that decision. Some of those cases have turned upon a consideration of whether the particular words in question in that case were such as to entitle the common carrier to say that he had in express and unambiguous terms exempted himself from liability. An illustration of that is the case of *Joseph Travers & Sons, Ld.* v. *Cooper* (4), where there are some helpful remarks by Kennedy L.J. in the Court of Appeal. He says this (5): "In the present case,

(1) [1904] 1 K. B. 412.
(2) Ibid. 414.
(3) (1872) L. R. 7 Ex. 267.
(4) [1915] 1 K. B. 73.
(5) Ibid. 93.

whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent. Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words 'however caused' I am of opinion that he would not be, and that the decision of this Court in *Price & Co.* v. *Union Lighterage Co.* (1), affirming the judgment of Walton J. (2), which is referred to by Pickford J. in his judgment in the present case, would bind us so to hold. In that case, however, there were no such words as 'however caused.' The contract of carriage exempted from liability only 'for any loss of or damage to goods which can be covered by insurance.' There were no words referring to causation. Mr. Roche, in his full and able argument, has satisfied me that the presence of such words creates an essential difference; and that, whilst it is settled law that a contractual exemption, whether from loss or damage generally or from certain enumerated forms of loss or damage (such, e.g., as collisions, stranding, and other perils), will not be read as protecting the carrier from liability for loss or damage if the loss or damage is proved to arise from the carrier's negligence, and words 'for any loss of or damage to goods which can be covered by insurance' do not operate to enlarge the exemption, as appears from the case to which I have just referred, a different position in regard to the carrier's liability is created if the exemption clause is so worded as, according to the natural and plain interpretation of its language, clearly to comprehend all loss or damage, however that loss or damage may originate." To repeat, a common carrier, being under an absolute liability, may by contract exempt himself from the consequences of his negligence, but he must do so in express and unambiguous terms. That is the doctrine, and the later cases are illustrations of how it is applied in each case in regard to the particular words in the particular contract in question.

It is admitted that in this case the defendants are not

(1) [1904] 1 K. B. 412. (2) [1903] 1 K. B. 750.

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common carriers. What is the position of persons who are not common carriers, that is to say, people who carry goods for reward, but who are not affected by the absolute liability of the common carrier? A carrier who is not a common carrier undertakes to answer for loss arising from his own or his servants' negligence, that is to say, he will be liable for loss arising from the failure to use proper skill and care. But just as a common carrier may exempt himself from liability by using express and unambiguous language, so also a carrier of the class with whom we are now dealing may exempt himself from liability by using proper words. I think that principle is laid down in the judgment of Lord Dunedin, referred to by Mr. Thorn Drury, in *London and North Western Ry. Co.* v. *Neilson.* (1) He says: "Here again I borrow from Scrutton L.J., who says that it is a broad principle of great importance in all contracts of carriage that when a carrier protects himself by exceptions, unless they are very clearly worded, they only apply to his carrying out of the contract and do not apply if he is doing something which he has not contracted to do. There is a familiar example of that rule in the cases which have held that an exception in a bill of lading is unavailing as against a loss due to causes falling within the words of the exception, but incurred in the course of a deviated voyage." As far as this part of the discussion is concerned I think the familiar doctrine of law applies—namely, that if a man wishes to exempt himself from liability he must say so in clear and unambiguous terms. I do not lay it down as a matter of law that there is any difference between the manner in which an ordinary carrier ought to express his exceptions and that in which a common carrier is called upon to express his exceptions, save to say that it may well be that inasmuch as the liability of a common carrier is absolute, there is an exceptional duty placed upon him to see that his exception clause is express and unambiguous in its terms. I certainly am prepared to hold that an ordinary carrier must also make his exception clause clear and unambiguous in its terms.

(1) [1922] 2 A. C. 263, 272.

Mr. Hawke admits that the doctrine with regard to the expressing of exceptions by a common carrier places a higher duty upon him than the one which is placed upon a carrier who is not a common carrier, and, subject to what I have already said, it may be that there is some small difference between them. But Mr. Hawke in this case says that even if the defendants were common carriers this clause is expressed in such unambiguous terms and with such clearness that it protected them. Mr. Thorn Drury's reply to that contention is an ingenious one. He asks me to apply as an analogy that class of case which says that where a shipowner supplies an unseaworthy ship the basis of the contract is gone, and that his exception clause does not apply. I do not think it is possible to transfer the analogy of that law, as to which very different considerations apply, to the law now under discussion. It may very well be that where a shipowner contracts to supply a ship the law places upon him the obligation to supply a seaworthy ship, and if he supplies an unseaworthy ship he does not perform his contract at all; but I cannot think that that doctrine applies to the case of supplying a servant, as was done in this case by the Civil Service Supply Association, the contractors, to carry out the contract in question. Mr. Thorn Drury asks me to say that the supplying of a servant who will not be negligent is a condition precedent to the contract, and, therefore, if a negligent servant is supplied, the person supplying such servant cannot rely upon the exception. Mr. Thorn Drury was a little apprehensive of carrying that argument to its full length; at any rate he says that the defendants cannot rely upon some of the exceptions. I do not, however, think that one can apply the analogy of the warranty of seaworthiness, that is, that the ship must be seaworthy, to a case of the present character, and say that there is a warranty that the servant will not be negligent, and that if he is negligent the persons supplying him cannot take advantage of the exceptions in their contract.

Those being the general remarks upon the law which I desire to make, I come to the point which I suggested during

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the argument, and which I still think is the real point in the case—namely: What is the meaning of cl. 11? Is it express and unambiguous? It says: "The contractors are not responsible for loss or damage caused by fire." The contractors in this case would not, in my opinion, be liable for an accidental fire or a fire occasioned otherwise than by negligence. I do not think that it is possible to read that clause, as Mr. Thorn Drury asks me to do, as if the words were: "The contractors are not liable for accidental fire." What are the words in the clause put there for? If the contractors are not liable for accidental fire it seems to me that those words would have no meaning at all if they are to be construed in the way that Mr. Thorn Drury asks me to construe them. Mr. Thorn Drury says: that even if one does not read into the clause the word "accidental," at any rate the proper way to read the clause is that "the contractors are not responsible for loss or damage caused by fire, unless it is caused by the negligence of the contractor." That seems to me to be reading into the clause words which are not there. The words of the clause are plain and they are unqualified. There is no definition clause restricting the meaning of the word "fire." Indeed it seems to me that the doctrine which has been set up does not really apply in this case. There is no absolute liability here as there is in the case of a common carrier. If there were an absolute liability, it is necessary, in order to escape such liability, to use express words; but here there is the express and unqualified word "fire." I do not think that the doctrine really comes in here, because, in the first place, there is no absolute liability, and, secondly, it seems to me that the words of the clause are strong, unqualified, and unrestricted, under which the contractors say that they will not be liable for fire.

I am therefore compelled, very much against my will and with very much regret, to hold that my judgment here must be for the defendants. No suggestion has been made that the plaintiff did not sign or did not understand the contract, but this most unfortunate lady, who probably

did not know what was in the conditions, loses the whole of her goods because of this clause. Of course it may be said that she ought to have read it and that she could have insured her goods, but I must say that I think it is a very hard case. I do not invite an appeal because I know what the expense of litigation is, but if the case should be taken to the Court of Appeal and the Court of Appeal should reverse my decision, nobody would be more glad than myself; but unfortunately I have to do the best I can as a judge and not as an individual, and with great regret I must give judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Bartlett & Gregory.*
Solicitors for defendants: *Bulcraig & Davis.*

R. F. S.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1925

Feb. 11, 12; *March* 20.

C. A. *Oct.* 14.

AMAN *v.* SOUTHERN RAILWAY COMPANY.

Railways—Grouping of—Absorption of subsidiary Company—Judgment against subsidiary Company prior to Absorption for Arrears of Interest on Debenture Stock—Effect of Absorption on Judgment—Railways Act, 1921 (11 & 12 *Geo.* 5, *c.* 55), *s.* 5; *Southern Railway (Freshwater, Yarmouth and Newport Railway) Absorption Scheme*, 1923 (*Stat. R. & O.*, 1923, *No.* 1044), *ss.* 3, 9, 11.

Judgment was recovered in 1912 against a railway company for arrears of interest on some of its debenture stock, but the judgment was not satisfied. The said debenture stock, with all arrears of interest thereon, was purchased by the plaintiff, who also took an assignment of the judgment. The railway in question was by virtue of the Railways Act, 1921, and of an absorption scheme made thereunder absorbed in, and its liabilities were transferred to, the Southern Railway. By that scheme it was provided that the registered holders of stock of the absorbed company should become holders of stock of the Southern Railway in certain proportions in lieu of the stock of the absorbed company held by them, and that the holders should be deemed to have accepted the stock allocated to them under the scheme "in substitution for the stock of the (absorbed) company held by them and in satisfaction of all claims

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thereunder including any arrears of interest." In accordance with the scheme stock of the Southern Railway was allocated to the plaintiff in substitution for the debenture stock held by him in the absorbed company. The plaintiff brought this action against the Southern Railway upon the judgment to recover (*a*) the amount of the judgment debt of which he was assignee, and (*b*) the statutory interest which had accrued due upon that judgment.

Greer J. gave judgment for the defendants upon the claim under head (*a*) and for the plaintiff upon that under head (*b*). On appeal:—

Held, that the claim under the judgment for the arrears of interest due on the debenture stock was not the less a "claim thereunder" within the meaning of the absorption scheme because the debt had become merged in the judgment. The judgment was a security for the payment of that debt, and upon the extinguishment of the debt by reason of the absorption scheme the judgment was extinguished also; and the same consequence attached to the claim for the statutory interest upon that judgment. The plaintiff's claim therefore failed under both heads.

Judgment of Greer J. in part affirmed and in part reversed.

ACTION tried before Greer J. without a jury.

The following statement of facts is taken from the judgment. Arthur Bird, Charles Hodges, and Clare Henry Regnart, who were the holders of certain debentures issued by the Freshwater, Yarmouth and Newport Railway Company, recovered judgment (1) in the King's Bench Division against that company on December 9, 1912, for the sum of 15,266*l.* 15*s.* 6*d.*, being arrears of interest on the 5 per cent. debenture stock held by them in the company to the nominal amount of 16,685*l.*, and for 4*l.* 14*s.* for costs.

In 1913 the plaintiff, Frank Gerard Aman, purchased the said debentures with all arrears of interest thereon from the said Arthur Bird, Charles Hodges, and Clare Henry Regnart, and on May 22 in that year took an assignment of the said judgment. By reason of s. 4 of the Railway Companies Act, 1867, it was impossible for the plaintiff to issue execution against the Freshwater Railway Company. The only way in which it was possible for him to do anything towards the realization of the judgment was to petition under the section for a receiver and manager of the undertaking. This he did, and on June 4, 1913, the plaintiff and Sir Sam Fay were appointed

(1) The judgment was recovered under s. 27 of the Companies Clauses Act, 1863.

receivers and managers of the undertaking of the company, without prejudice to the rights of prior encumbrancers, and the Court directed the following inquiry: "An inquiry what are the debts and liabilities of the said railway and what are the rights and priorities of all persons interested in the moneys to come to the hands of the petitioner and the said Sir Sam Fay as such receivers and managers." The inquiry was duly held, and the certificate of Master Keen dated November 30, 1915, states the results of this inquiry, and, except with regard to the statement that the total indebtedness of the company was 187,997*l.* 2*s.* 3*d.*, the facts stated in the certificate and the schedules thereto were accepted as accurate by the parties to this action.

It appeared that there were three classes of debenture holders who are stated in order of priority, "A" debenture holders, 5 per cent. perpetual debenture stock holders, and 5 per cent. "B" debenture stock holders. The plaintiff held debentures in each class, but it was only in respect of his 5 per cent. perpetual debenture stock that the judgment mentioned above had been recovered. In the second schedule to the certificate the liability of the company to him is stated as follows:—

Serial No.	Name of holder.	Address.	Principal sum due.	Interest due to 31st Dec., 1914.
1.	Aman, F. G.	49 Finsbury Pavement, E.C.	16,685*l*	17,352*l* 8*s.* 0*d.*

The plaintiff's name also appears in the fourth schedule as a judgment creditor for the sum of 16,048*l.* 6*s.* 10*d.* This sum in fact consisted of the 15,271*l.* 9*s.* 6*d.*, the amount of the judgment for debt and costs, with interest at 4 per cent. to the date when it was ascertained for the purposes of the certificate. The item of 17,352*l.* 8*s.* included the amount of the judgment, but not the amount of the costs nor the amount of the 4 per cent. interest that had accrued on the judgment. In ascertaining the figure for the total indebtedness the amount of the judgment was by inadvertence added twice, as it appeared once in the sum of 17,352*l.* 8*s.* and again in the sum of 16,048*l.* 6*s.* 10*d.*

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The result of the appointment of the receivers and the inquiry was that on the moneys received by the receivers, the "A" debenture holders had the first claim, and the 5 per cent. perpetual debenture stock holders had the second claim. If there had been enough to pay the 5 per cent. perpetual debenture stock holders the interest which was due to them as set out in the second schedule, the plaintiff would not have been entitled in addition to be paid the amount of his judgment as a judgment creditor, but as such creditor would only have been entitled to be paid that part of the 16,048*l.* 6*s.* 10*d.* which had not been included in the sum of 17,352*l.* 8*s.* in respect of which his claim had priority over his claim as judgment creditor. The receivers distributed the receipts of the railway company in the order of priority set out in the certificate, but the money so received was not sufficient to pay the 5 per cent. perpetual debenture stock holders in full, either their arrears of interest or the further interest that became due on the debentures from time to time.

At various dates between March 24, 1916, and April 12, 1923, which appear in a document put in at the hearing, the amounts paid to the plaintiff on account of interest amounted to 6515*l.* 2*s.* 9*d.* No evidence was given to show what those sums were allocated to, but it seems clear that they could not be allocated to the statutory interest on the judgment, but must have been treated as allocated to claims which had priority over the judgment debt qua judgment debt.

By the Railways Act, 1921 (11 & 12 Geo. 5, c. 55), provision was made for the amalgamation of the principal railways in the country into certain groups set out in the Schedule, one of which was the Southern Group. The Act also provided for the absorption into the southern group when formed of the Freshwater, Yarmouth and Newport Railway Company. Sect. 4 of the Act provided for the absorption of a subsidiary company by means of schemes to be settled by the amalgamation tribunal. By s. 5 it was enacted that an absorption scheme should provide in such manner as should appear to be

necessary and expedient for the transfer to the amalgamated company of all the property, rights, powers, duties and liabilities, whether statutory or otherwise, of any subsidiary company to which the scheme relates, and that the scheme should incorporate the provisions of Part V. of the Railways Clauses Act, 1863, subject to the provisions of the Railways Act, 1921. Part V. of the Railways Clauses Act, 1863, contains s. 40, which provides that except as may be otherwise provided in a special Act, all debts or moneys due from or to the dissolved company shall be payable and paid by or to the amalgamated company. As applied to a company absorbed under the Act of 1921 this means that except as provided in the scheme all debts and moneys due from the absorbed company shall be payable and paid by the amalgamated company.

In due course an absorption scheme was settled by the amalgamation tribunal, and this scheme has now the force of a statute. By s. 3, sub-s. 2, of the scheme, which is entitled "The Southern Railway (Freshwater, Yarmouth and Newport Railway) Absorption Scheme, 1923," Part V. of the Railways Clauses Act, 1863, subject to the provisions of the Act, that is the Railways Act, 1921, was incorporated in the scheme, and it was provided that for the purpose of construing Part V. the time of the amalgamation should be the date of settlement. Sect. 9 of the scheme is as follows: "The several persons who immediately before the date of settlement are the registered holders of the stock of the vested company described in the first column of the schedule hereto shall . . . . on and from such date by virtue of this scheme become and be registered holders of stock of the company of the class and in the proportions specified in the said schedule in lieu of and in exchange for the stock of the vested company held by them respectively." By "vested company" in the scheme is meant the Freshwater Company. Sect. 11 is as follows: "The persons who by virtue of this scheme become the registered holders of stock of the company shall (subject to the provisions of this scheme) accept and be deemed to have accepted the stock allocated to them under this scheme

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in substitution for the stock of the vested company held by them and in satisfaction of all claims thereunder including any arrears of interest."

The schedule to the scheme is in the following form :—

THE SCHEDULE.

1. Stock of vested company.			2. Stock of the company created and issued by this scheme.			3. Amount of stock in column 2 to be issued in exchange for each 100*l.* of stock in Column 1 and so in proportion.
Description.	Amount.		Description.	Amount.		
	£	*s.* *d.*		£	*s.* *d.*	£ *s.* *d.*
3½ per cent. "A" pre-debenture stock	20,000	0 0	4 per cent. debenture stock	17,500	0 0	87 10 0
5 per cent. perpetual debenture stock	47,300	0 0	5 per cent. preference stock	37,840	0 0	80 0 0
5 per cent. "B" debenture stock	24,077	0 0	Preferred ordinary stock	9,630	16 0	40 0 0
5 per cent. perpetual preference stock	42,000	0 0	Ordinary "B" stock	21,000	0 0	50 0 0
6 per cent. Preferred ordinary stock	42,008	0 0	To be cancelled.			
Deferred ordinary stock	50,073	0 0	To be cancelled.			(L.S.)

In accordance with the scheme the plaintiff's due proportion of the 37,840*l.* 5 per cent. preference stock has become vested in him in substitution for his 16,685*l.* 5 per cent. perpetual debentures in the Freshwater Company, and all arrears of interest thereon. The plaintiff's arrears of interest on his perpetual debenture stock, including the arrears covered by the judgment, were proportionately the same as the arrears of interest of all the other 5 per cent. perpetual debenture holders, and it seems to me plain that it was intended to treat all such debenture holders alike and to give them stock in satisfaction of their stock and all unpaid interest thereon in the same proportion. The scheme deals with them as a class.

The present action is brought upon the judgment, of which the plaintiff is assignee, to recover the amount thereof and the interest which has accrued since the date of the judgment, as a debt which the defendants have taken over from the Freshwater Company and which the plaintiff says has not been satisfied by the preference stock which he has received under the scheme.

Grant K.C. and *Rowand Harker* for the plaintiff.

Sir John Simon K.C., *Hon. S. O. Henn Collins* and *H. C. Bischoff* for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1925. March 20. GREER J. read a judgment in which, after setting out the facts as stated above, he continued as follows: The plaintiff claims that the amount of the judgment is not within the words of s. 11: "all claims thereunder including any arrears of interest." It was contended on his behalf that the judgment obtained by his predecessors converted the Freshwater Company's debt from a debt by covenant to a judgment debt, and that the debt which had existed before judgment for arrears of interest did not exist after judgment, as it had become merged in the judgment debt, and that, although his claim to the principal of his debenture and to any interest on the debenture which was not included in the judgment has been satisfied by reason of the allocation to him of the preference stock in satisfaction of his claims on his debenture stock including arrears of interest, still there is nothing in the scheme which prevents him from saying that the debt of record created by the judgment was at the date of the claim a debt or liability which arose out of the judgment, and not a debt for arrears of interest arising under his original debenture stock; and he contends, secondly, that if he should be wrong as to the amount of the debenture interest recovered by the judgment, at any rate he is entitled to sue for the 4 per cent.

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interest on the judgment, which has never been paid, and for the 4*l.* 14*s.* costs. On the other hand, it is contended by the defendants that the effect of the scheme is to give each debenture holder in satisfaction of all money claims secured by his debenture, whether for principal or interest and whether covered by judgment or not, a certain proportion of stock, and that the stock received by the plaintiff was a satisfaction of all his claims in the present action.

A mortgagee or debenture holder is a creditor who has two different classes of rights, a right to recover the amount of his debt with interest by action in a Court of law as soon as it has become payable and has not been paid, and, secondly, certain rights over the property of his debtor which are conferred by the mortgage or charge and which for convenience were referred to at the hearing as "real rights" as distinguished from personal rights. If he has converted his personal rights into a judgment debt, he still has his real rights as security for that judgment debt, but of course he can only exercise those real rights if his judgment is in respect of moneys becoming due under his mortgage or debenture. It seems to me that the correct way to describe the debt owing to the plaintiff after he had obtained his judgment is to call it a judgment debt for interest accrued under his debenture. If he were not able so to describe it, he could not exercise his real rights in respect of it. Though the debt has changed its nature and become a judgment debt, it is still a debt arising out of the debenture, and if the plaintiff could, by putting into operation his security, have realized enough to pay his principal and interest including the judgment, he could not have said that he was entitled to have the amount of the judgment as well; and on the other hand if his judgment had been paid he could not have said: "I have not been paid my arrears of interest; I have only been paid the amount of a different debt—namely, that created by the judgment." Further, as Sir John Simon for the defendants pointed out, the schedule to the scheme shows that the intention of the scheme was to satisfy the holders of stock in the Freshwater Company in classes, and that if it had been intended that the

stock allocated to the plaintiff should not be treated as a satisfaction of the arrears of interest included in his judgment, he ought to have had a smaller allowance of preference stock in the Southern Company than that which was being given to the other debenture holders of the same class, inasmuch as if the interest included in the plaintiff's judgment were deducted from the interest due to him, the interest for which he was being compensated by preference stock would be proportionately much less than the interest for which his fellow debenture holders of the same class were being compensated.

In my judgment the words in s. 11 of the scheme, "all claims thereunder including any arrears of interest," are wide enough to include claims under a judgment in respect of interest, notwithstanding the fact that legally the debt for interest was merged in the judgment. I think, however, that that part of the plaintiff's claim which consists of a claim for his statutory interest on his judgment stands on a different footing. His debentures gave him no right to this, and they were not a security for its payment. It is a statutory debt due by reason of the provisions of s. 17 of the Judgments Act, 1838 (1 & 2 Vict. c. 110). It does not, in my view, in any true sense arise "thereunder" within the meaning of s. 11 of the scheme. It arises under the judgment by reason of the provisions of the Judgments Act. I also think that the part of the judgment which consisted of costs is outside the protection claimed by the defendants under s. 11 of the scheme.

It follows that there must be judgment for the plaintiff for that part of the claim which consists of interest on the judgment, and the 4*l.* 14*s.* costs, that is to say for the amount of the statutory interest on the judgment to the date of the settlement of the scheme and the 4*l.* 14*s.* The plaintiff will have the costs of the action.

I have dealt with this case on principle. I cannot say that the decision of the Court of Appeal in *Potteries, Shrewsbury and North Wales Ry. Co.* v. *Minor* (1) is a conclusive authority

(1) (1871) L. R. 6 Ch. 621.

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on the questions involved in this case. Questions of construction must always depend on the particular words which have to be interpreted, and the particular facts relevant to their interpretation, but the reasons given in their judgments by the Court of Appeal in that case appear to me to afford a strong argument in support of the view I have taken of the present case.

Judgment accordingly.

R. F. S.

The plaintiff appealed against the disallowance of his claim under the judgment, and the defendants cross-appealed against the allowance of the plaintiff's claim for interest on the judgment.

Grant K.C. and *Rowand Harker* for the appellant. The scheme of absorption did not take away the plaintiff's right to recover the amount of the judgment debt. That debt did not come within the words "all claims arising thereunder including arrears of interest." No doubt if the scheme had been passed before the judgment was obtained the debt would have been extinguished, but on recovery of the judgment it altered its character; it was merged in the judgment and became a debt of record, with the result that the language of s. 11 could not apply to it. The effect of this was no doubt to place the plaintiff in a better position than the other debenture holders, but he was entitled to the benefit of his diligence in obtaining the judgment. But if the interest in respect of which the judgment was obtained did not come within the words of the section, still less did the interest on the judgment itself. The debentures gave the plaintiff no right to this latter interest. It was not charged on the property, and upon a taking of the mortgage account it would not have to be brought into that account. Moreover it is charged at a different rate from that of the debenture interest. That was 5 per cent., whereas the statutory interest on a judgment is only 4 per cent.

Sir John Simon K.C., *Hon. S. O. Henn Collins* and *H. C. Bischoff* for the respondents. The fallacy of the

appellant's contention lies in the assumption that he has still got an existing judgment. But a judgment recovered by a mortgagee for interest due on the mortgage is only an additional security for the payment of the mortgage debt, and if the mortgage debt is extinguished all the securities for its satisfaction, including the judgment, go with it: *Potteries, Shrewsbury and North Wales Ry. Co.* v. *Minor*. (1) On the redemption of a mortgage the mortgagor is entitled to have transferred to him all the securities held by the mortgagee: *Greenough* v. *Littler*. (2) There in a foreclosure action, in which the mortgagee had obtained a personal judgment for the mortgage debt against the mortgagor and a foreclosure judgment against the mortgagor and a purchaser from him, the minutes of decree ordered that the purchaser, in the event of his redeeming the judgment, should have transferred to him the personal judgment against the mortgagor. That principle equally applies to the interest on the judgment which is the subject of the cross-appeal. If the judgment is only a security for the mortgage debt and ceases to be enforceable as soon as the mortgage debt is satisfied the interest on the judgment must equally cease to be payable. The same proposition also applies to the claim for costs.

Grant K.C. in reply.

BANKES L.J. We have in this case an appeal and a cross-appeal from a judgment of Greer J., the dispute between the parties depending upon the true construction to be placed on certain words in s. 11 of the Southern Railway (Freshwater, Yarmouth and Newport Railway) Absorption Scheme. It appears that the late Sir Blundell Maple was the holder of 5 per cent. perpetual debenture stock of the Freshwater, etc., Railway Company, and a large sum was due to him in respect of arrears of interest on the said stock at the time of his death. His executors brought an action to recover the sum of 15,266*l*. 15*s*. 6*d*., being the arrears of interest due up to June 30, 1912, and in December, 1912, in default of appearance, they obtained judgment for that sum, together with

(1) L. R. 6 Ch. 621. (2) (1880) 15 Ch. D. 93.

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4*l*. 14*s*. costs. Subsequently the executors sold their debenture stock together with the arrears of interest to the present plaintiff, to whom they also assigned the benefit of the judgment which they had obtained. In 1921 the Railways Act of that year provided for the grouping together of the principal railways and the absorption of certain subsidiary railways into those groups under absorption schemes. Among those groups was the Southern Railway, and among the subsidiary railways to be absorbed into it was the Freshwater, etc., Railway. The Act stated what the absorption schemes were to contain. By s. 5 an absorption scheme under the Act was to provide (*a*) for the transfer to the absorbing group of the property, rights, powers, duties and liabilities of the subsidiary companies, (*c*) for the winding up of the subsidiary companies, and for the holder of any securities of the subsidiary companies receiving in satisfaction of all claims arising thereunder such securities of the absorbing group as might be specified in the scheme. In 1923 the Southern Railway (Freshwater, Yarmouth and Newport Railway) Absorption Scheme was passed by which (inter alia) the persons who immediately before the date of settlement were holders of the 5 per cent. perpetual debenture stock of the Freshwater, etc., Railway were to receive 80*l*. of 5 per cent. preference stock of the Southern Railway in exchange for every 100*l*. of their holding in the absorbed railway; and by s. 11 it was provided that "The persons who by virtue of this scheme become the registered holders of stock of the (Southern Railway) Company shall (subject to the provisions of this scheme) accept and be deemed to have accepted the stock allocated to them under this scheme in substitution for the stock of the (absorbed) company held by them and in satisfaction of all claims thereunder including any arrears of interest." Under that scheme the plaintiff received his full proportion of the 5 per cent. preference stock of the Southern Railway, and the question which we have to decide is whether by the receipt of that stock the plaintiff's claim as assignee of the above mentioned judgment is to be deemed to be satisfied.

It is not disputed that his claim to the principal of the debenture stock held by him has been satisfied and that, apart from the judgment, his claim for the arrears of interest on that stock would also have been satisfied; but it was contended that as his assignors had brought an action for a portion of those arrears and recovered judgment, their claim for that portion of the interest had become merged in the judgment and could no longer answer the description of a "claim thereunder" within the meaning of s. 11. The plaintiff says that his rights as a judgment creditor are unaffected by the extinguishment of his rights as a debenture holder. The mistake of that contention lies in failing to recognize what is the effect of a judgment obtained by a mortgagee for a mortgagor's debt. Such a judgment merely operates as an additional security for the due payment of the debt, and if the debt is extinguished the judgment goes with it. Thus in *Potteries, etc., Ry. Co.* v. *Minor* (1), where the defendant, a debenture holder of the plaintiff company, obtained judgment for his principal and interest, and the company filed a scheme of arrangement, to which the defendant did not assent, but which was confirmed and inrolled, the defendant was restrained from taking proceedings under his judgment. James L.J. said: "He" (the defendant) "was entitled to receive stock and bound to accept it; after which his debt is gone, and he cannot avail himself of his judgment, which is only one of the securities for that debt." Moreover when a mortgage debt is satisfied the mortgagee cannot avail himself of any other security that he may have, but is bound to hand it over to the mortgagor. That is clear from *Walker* v. *Jones* (2) and *Greenough* v. *Littler*. (3) Therefore when Mr. Aman accepted, as he was bound under the scheme to accept, the allotted amount of preference stock in substitution for his debenture stock, he was bound to give up his judgment. It was in view of that obligation that the draftsman of s. 11 must be assumed to have drawn it in the terms in which he did; and when he said that the new stock

(1) L. R. 6 Ch. 621, 624. (2) (1866) L. R. 1 P. C. 50.
(3) 15 Ch. D. 93.

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allotted in exchange for the debenture stock previously held was to be " in satisfaction of all claims thereunder," he must be understood as having intended to include under those words not only claims against the property charged but also claims under any collateral security which, upon demand, the debenture holder would be bound to hand over to the mortgagors. On these grounds I think that Greer J. was right in holding that the plaintiff's claim to recover the amount of the judgment debt was gone.

But the plaintiff took a second point; he contended that even if he was wrong in claiming the amount of the judgment itself he was at least entitled to the interest on that judgment, which was an entirely separate and independent claim, arising by statute and not out of the debt for which the judgment was obtained. But in my view that interest is nothing but the fruit of the judgment, and if the tree dies the fruit must die with it. The same thing applies to the claim for the costs of obtaining the judgment. The plaintiff's claim for interest on the judgment and for the mortgagee's costs fails. The plaintiff's appeal must be dismissed, and the defendants' cross-appeal allowed.

SCRUTTON L.J. In this case the plaintiff was the holder of certain debenture stock of a not very prosperous railway in the Isle of Wight, the Freshwater, Yarmouth and Newport Railway. The interest on that stock had long been in arrear, and for a portion of those arrears, that which had accrued before June 30, 1912, he held a judgment. Then came the great scheme for the amalgamation of railways in 1921, and by the Railways Act, 1921, it was provided that, in addition to the larger railways being amalgamated into groups, the smaller railways should be absorbed by the larger ones, and the holders of stocks of the railways so absorbed should be compelled to accept in substitution therefor stock of the absorbing companies. Under an absorption scheme made in 1923 in pursuance of that Act the plaintiff was allotted his proportion of preference stock of the Southern

Railway in substitution for his debenture stock in the Freshwater Railway, and by s. 11 of that scheme it was provided that: "The persons who by virtue of this scheme become the registered holders of stock of the (Southern) Company shall . . . . be deemed to have accepted the stock allocated to them under this scheme in substitution for the stock of the (Freshwater) Company held by them and in satisfaction of all claims thereunder including any arrears of interest." Mr. Aman does not dispute that thereby his claim in respect of the debenture stock, and also in respect of so much of the arrears of interest on that stock as were not covered by the judgment, was fully satisfied, but he says that he is still entitled to be paid the amount of that judgment and also the interest at 4 per cent. which by statute the judgment carries. The propriety of that claim turns upon two words in s. 11 to which I have referred. Was the claim under the judgment a "claim thereunder," that is under the debenture stock? Now I think it is settled law that where a creditor holds a security for his debt, upon the debt being discharged he must hand over the security to the debtor, and that where a mortgagee of property recovers judgment in a personal action for the mortgage debt the mortgagee's real rights in the mortgaged property are not merged in the judgment but remain, and the judgment is merely an additional security for the payment of the debt. Here the plaintiff's debt has been redeemed by the compulsory allocation to him of stock; he must consequently hand over the securities which he held for his debt, including the judgment. That disposes of the plaintiff's claim for the arrears of interest in respect of which the judgment was obtained. On that matter I agree with Greer J. The learned judge, however, thought that it was impossible to describe the claim for the 4 per cent. interest on the judgment as a claim "under the debenture stock," for it owed its origin entirely to the statute. But with great respect to that judge, from whom I never differ without the greatest hesitation, I think that is rather too narrow and technical a view. It appears to me that if the tree falls the fruit falls with it, and if the judgment is gone the incidents

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of the judgment are equally gone, including the statutory interest. I think that the defendants' cross-appeal ought to be allowed.

EVE J. Apart from the existence of the judgment it has not been disputed, in fact it could not be disputed, that the appellant's claim as a debenture holder both for principal money and arrears of interest has been satisfied by the allotment to him of the stock that was so allotted. But it is said that the personal judgment which his assignors had obtained before the absorption of the Freshwater Railway has not been so satisfied, and that it is competent for him still to enforce it against the absorbing company. Now what is the nature of the judgment obtained by a mortgagee in an action on the personal covenant in the mortgage ? It certainly does not confer on the mortgagee a right to have his money twice over. All it gives him is an additional security for the money for which the judgment was pronounced. In this case the particular money which was the subject of the judgment was the arrears of interest, and the judgment constituted a further security for the payment of that interest. The interest has been satisfied by the allotment of stock to the appellant, and by that satisfaction of the interest the right to enforce any of the securities for its payment has been determined. So far as it was sought to enforce the judgment for the arrears of interest the appeal fails. Then Mr. Grant, in dealing with the cross-appeal, took the point that the liability on the part of the judgment debtor to pay interest on the judgment was an entirely new liability, and that the mortgagee was entitled to recover it from the mortgagor even though the whole of the principal and interest due under the security had in fact been paid. That to my mind is contrary to the principles upon which these matters have always been dealt with in the Chancery Division. It has always been incumbent on the mortgagee on the taking of the account to bring into it all that he receives under the judgment, including the interest on the judgment itself. The same reasoning applies to the costs. If the mortgagee does not recover the costs

from the mortgagor under the personal judgment he brings them into his account, and they must be paid before the mortgage is redeemed. I think the learned judge below in allowing the appellant the interest on his judgment was wrong.

Appeal dismissed. Cross-appeal allowed.

Solicitors for the appellant: *Nash, Field & Co.*
Solicitor for the respondents: *W. Bishop.*

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Landlord and Tenant—Rent Restrictions—Evasion of Statute—Verbal Agreement to pay Rent exceeding standard Rent—Lease for Fourteen Years at standard weekly Rent—Separate Agreement to pay also weekly "premium"—"Premium" terminable with Tenancy—Action to recover "premium"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 1, 8, *sub-s.* 3.

By an oral agreement a landlord let a flat, the standard rent of which was thirteen shillings and sixpence, to the tenant at a rent of twenty-five shillings per week, but, with the admitted intention of evading the Rent Restrictions Acts, the parties executed a lease of the flat for fourteen years (whereby the payment of a premium became lawful) at the standard rent of thirteen shillings and sixpence per week, with a proviso that the tenant might terminate the tenancy by giving one week's notice to quit, and at the same time made a separate agreement in writing that the tenant should pay to the landlord a "premium" of eleven shillings and sixpence weekly, this, with the above rent, aggregating the twenty-five shillings per week so verbally agreed. By reason of the provision as to notice to quit, the "premium" was terminable with the tenancy.

Held, in an action to recover one week's payment of the eleven shillings and sixpence, that the transaction must be looked at as a whole and the two documents read together, and that, so dealt with, the eleven shillings and sixpence was part of the rent and not premium, and was, as such, irrecoverable.

APPEAL from Marylebone County Court.

The respondent, the plaintiff William Belmer Rush (called herein "the landlord"), was the landlord of a flat, 231 Portnal Road, Paddington, in the County of London. In October, 1922, the defendant, the appellant Walter Albert Matthews

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(called herein "the tenant"), in response to an advertisement, saw the landlord's daughter, Miss Winifred Rush, who in fact conducted the landlord's business, with a view to becoming tenant of the flat. The county court judge's note of Miss Rush's evidence was as follows: "I told him [the tenant] situation of flat and that the rent would be 25*s.* per week. That this was a flat to which the Rent Restrictions Acts applied and that in order that I could get the 25*s.* per week a lease [for fourteen years] would have to be granted embodying a rent of 13*s.* 6*d.*, and 11*s.* 6*d.* would be by way of premium, and I should also require a premium of 10*l.* on the signing of the lease." By s. 8, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), the provisions of the section prohibiting the payment of a premium were not to apply in the case of the grant of a lease of fourteen years or upwards. A rent of 13*s.* 6*d.* per week was the standard rent with permitted increases. The tenant agreed to this, and accordingly a lease dated October 28, 1922, was executed demising the flat to the tenant for fourteen years from October 30, 1922, at a "yearly rent of thirty-five pounds two shillings by fifty-two equal payments of thirteen shillings and sixpence on the Monday of every week." Clause 4 (*c*) provided: "The tenant may be at liberty to determine this lease upon giving one week's notice in writing." The tenant also covenanted not to assign or underlet the premises.

On the same date, October 28, the tenant by a separate agreement in writing with the landlord agreed: "In consideration of your having granted me a lease for fourteen years [of the said flat] with the option to determine the same on one week's notice I hereby undertake to pay to you the sum of 11*s.* 6*d.* weekly by way of premium commencing on October 30, 1922." This agreement was not mentioned in the lease. The 13*s.* 6*d.* mentioned in the lease and the 11*s.* 6*d.* in the above agreement together amounted to 25*s.* weekly. The tenant was given two books, a rent book and a "premium" book, containing receipts for the above sums respectively. The tenant duly paid both these sums for the

first six weeks, and the 10*l.* premium, but then refused to pay the sum of 11*s.* 6*d.* referred to in the agreement as "premium." The plaintiff issued this plaint to recover the week's "premium" payable under the agreement on December 18, 1922.

The county court judge gave judgment for the landlord for the amount claimed, and gave leave to appeal.

The tenant appealed.

Doughty K.C. and *Monier-Williams* for the tenant. The whole sum of 25*s.* was really rent, and, as such, admittedly in excess of the standard rent. It may be that the landlord would be estopped from calling the whole a rent, but that estoppel does not operate against the tenant. It is true that none of the attributes of rent attach to the sum of 11*s.* 6*d.*—namely, the right to distrain, forfeiture for non-payment, etc.—nor does the obligation to pay it run with the land, as does the obligation to pay 13*s.* 6*d.* under the lease; but the fact that the landlord waived these advantages does not prevent the payment from being rent. It is admitted that if the documents have their prima facie effect the judgment appealed against is right. But they do not represent the real transaction, which was the letting for 25*s.* per week and the payment of a premium of 10*l.*, as was quite frankly stated by the landlord's daughter. This was an attempt to evade the restrictions imposed by s. 1 of the Act of 1920, and, as is said in Maxwell on the Interpretation of Statutes (6th ed.), p. 206: "The phrase 'evasion' of an Act of Parliament really connotes an attempt to avoid compliance therewith." Documents are only evidence, cogent evidence, of the consensus of two minds; but if there is reason to believe that they do not represent that consensus then the inquiry may proceed further. These documents do not represent that consensus. The point that the consideration expressed for the payment of the 11*s.* 6*d.* was past, taken in the Court below, is not taken here.

J. Ronald Walker for the landlord. The payment of a premium is not against the policy of the Act, which was aimed at

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establishing fixity of tenure. Sect. 8 says in effect: "We will not have premiums; but we want tenants to have fixity of tenure, and if a lease of fourteen years is granted we do not object to the payment of premiums." This payment of 11*s.* 6*d.* cannot be rent, because it has none of the attributes of rent at all. The landlord is entitled to do anything not prohibited by the statute, and the statute in these circumstances does not prohibit payment of a premium, which need not be paid in a lump sum, and both parties have said that the 11*s.* 6*d.* is a premium.

Monier-Williams in reply. The agreement is void for uncertainty; no period during which the 11*s.* 6*d.* is to be payable is named, nor is any lump sum premium fixed of which the 11*s.* 6*d.* was to be an instalment.

SANKEY J. This is the landlord's appeal from the judgment of the judge at the Marylebone County Court, who adjudged that the tenant should recover the sum of 11*s.* 6*d.* alleged to be due in respect of one week's premium payable under an agreement dated October 28, 1922, made between the landlord and the tenant. The defence was that, although the agreement described this sum of 11*s.* 6*d.* as premium it was really rent, not recoverable by reason of the operation of the Rent Restrictions Acts. A further point was taken by the tenant —namely, that the agreement was inoperative because of its uncertainty. Another point, taken in the court below, that the agreement was void because the consideration was a past one has not been taken before us.

The facts appear to be as follows. The landlord was the owner of some premises, a flat, at 231 Portnal Road, Paddington, and the tenant, the defendant, was anxious to take this flat, and with that end in view went and saw the landlord's daughter, who managed her father's business, and is obviously a young lady of considerable legal ability. She knew exactly what her father wanted. He wanted a certain rent—namely, 25*s.* weekly, and a certain premium—namely, 10*l.*; but there was a difficulty about the rent, because the rent he wanted was not one the law allowed him to charge, the premises

being subject to the Rent Restrictions Acts. The landlord's daughter then made up her mind to see whether those Acts could be evaded. I do not suggest that she was doing anything morally wrong. She set her wits to work to try and get round these Acts of Parliament. Her evidence at the trial, which no doubt was absolutely truthful, was as follows, as set out in the judge's note. "I told him situation of flat and that the rent would be 25*s.* per week. That this was a flat to which the Rent Restrictions Acts applied and that in order that I could get the 25*s.* per week a lease [for fourteen years] would have to be granted embodying a rent of 13*s.* 6*d.*, and 11*s.* 6*d.* would be by way of premium, and I should also require a premium of 10*l.* on the signing of the lease." I should state here that s. 8, sub-s. 3, of the Increase of Rent, &c. (Restrictions) Act, 1920, provides that the section, which prohibits the payment of premiums, shall not apply in the case of a lease for fourteen years or upwards. The tenant agreed to take the flat. The landlord then granted, firstly, a lease and, secondly, made an agreement. The daughter gave the tenant the keys, he paid the 10*l.* premium, and took possession. Two documents were given him, a rent book and a "premium book." Some time later the defendant refused to pay the week's "premium" of 11*s.* 6*d.* alleged to be due, and these proceedings were taken in the county court to recover it.

The lease is an indenture made on October 28, 1922, apparently for a term of fourteen years, at a rental of thirty-five pounds two shillings payable by fifty-two equal payments of thirteen shillings and sixpence weekly, with a proviso granting the tenant the right to terminate the tenancy by giving a week's notice.

I think it is clear, and indeed not disputed, that under that document the landlord had the ordinary rights of a landlord—namely, to distrain for the rent and, under certain circumstances, to bring an action for forfeiture for non-payment of rent. The other document, made contemporaneously, was of a different character. [His Lordship read it.] When the case came on in the county court the landlord said: "Here is a document under which this premium is

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payable and it has not been paid, and the tenant is being sued for one week's premium." The tenant replied that this 11*s.* 6*d.* was not a premium at all; that it was masquerading under the name of premium but was in fact merely rent, and moreover rent within the meaning of s. 1 of the Increase of Rent, &c. (Restrictions) Act, 1920; that as the rent reserved by the lease was 13*s.* 6*d.* weekly, and the rent falsely called premium was 11*s.* 6*d.*, the total amounted to 25*s.*, and the standard rent, with permitted increases, being 13*s.* 6*d.* only, consequently, the 11*s.* 6*d.* was irrecoverable.

If I may be allowed to say so, the learned county court judge has given a very helpful and illuminating judgment, and counsel for the landlord said quite rightly that it is impossible to put his case better than did the judge. The judge says in effect: "The parties themselves have executed two documents, in one of which there is an agreement to pay 13*s.* 6*d.* described, and rightly described, as rent, and in the other an agreement to pay 11*s.* 6*d.* described as premium, and owing to the fact that the parties have dealt with the 25*s.* in two documents so describing the two sums, different considerations in law arise with regard to these two sums."

It is truly said that in respect of the 13*s.* 6*d.*, admittedly rent, numerous advantages and rights accrue to the landlord by reason of the fact that it is rent; he can distrain for it, and he can bring an action for forfeiture for non-payment, while by reason of the fact that the 11*s.* 6*d.* is different, and is not described as rent, the landlord is deprived of many of his remedies with regard to it. The judge points out that it is for rent, and rent only, that the landlord has by law the right to distrain, a most valuable privilege. The obligation to pay the rent runs with the land, and can be enforced against successors of the lessee. Rent is a specialty debt. Rent being the consideration payable for the possession of the land during the term, it is suspended if the lessee is deprived of the possession by eviction. Finally, non-payment of rent entitles the lessor to recover possession. This so-called premium is an obligation merely personal to the tenant, payment of which cannot be enforced by distraint, re-entry,

nor even by action against his successors. Above all non-payment will not render the tenant liable to ejectment.

I think these statements of the learned county court judge are beyond exception. It is true that the sum treated as rent has all these extra advantages, but I think it is necessary to go rather further back in the history of the matter, and although the sums are dealt with in two separate documents, and although the effect of this is to deprive the landlord of certain rights in respect of the so-called premium, I think it is our duty to consider the whole effect of the transaction and to read the two documents together, and say whether this really is rent within the Act or not. Now I begin by looking at this fact. We have the statement of the landlord's daughter, made with the utmost candour, that 25*s.* was to be rent, and that the premium was to be 10*l.* only. She knew that if the 25*s.* was described as rent her father would not be able to recover the whole of it. It does not appear to me so very material to consider the fact that in respect of the admitted rent the landlord has certain rights, and that he would not have those rights in respect of the sum described as premium. It was perfectly open to him to waive any of his remedies for non-payment of rent; if the sum is really rent, I do not think that the fact that the landlord consents to waive some of his remedies alters the character of the payment. What the landlord said was: "We will call 13*s.* 6*d.* rent and 11*s.* 6*d.* premium, and in order to make my position more secure I will waive some of my rights." Therefore, giving the best consideration I can to this case I am of opinion that the whole sum of 25*s.* was rent, and that the way in which it was dealt with in the two documents does not alter the character of the payment.

With regard to the point as to the uncertainty of the agreement to pay the 11*s.* 6*d.*, I agree with the learned county court judge. The documents were contemporaneous, and explain one another. I do not think there is any uncertainty.

For these reasons I am of opinion that this appeal should be allowed.

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SALTER J. This appeal raises a point of some importance, because if the decision of the court below was correct a simple method has been discovered of evading one of the fundamental provisions of the Rent Restrictions Acts. Mr. Doughty, for the tenant, admits that this is a lease for fourteen years, and therefore, under the provisions of s. 8, sub-s. 3, of the Act of 1920 the landlord was entitled to obtain a premium if he could do so, and in this case he did demand and receive a premium of 10*l.* The question here is not whether the 11*s.* 6*d.* is a premium within the meaning of s. 8, sub-s. 3, but whether it is rent within s. 1. Mr. Walker, for the landlord, admits, as he must, that if it is rent under that section the decision cannot stand.

I think that in this case these two documents ought to be read together. I think the legal rights of the parties are the same as if the lease had contained a provision in these terms : " In consideration of the above demise the tenant agrees with the landlord that he will pay to the landlord a premium of 11*s.* 6*d.* a week in addition to the rent of 13*s.* 6*d.* a week above reserved so long as he shall occupy the premises." In my opinion this 11*s.* 6*d.* is not really a premium at all. There is no objection, so far as I know, to an agreement to pay a premium by instalments. If this had been an agreement for fourteen years certain and a lump sum had been agreed upon as a premium with a provision that the tenant should pay it by certain instalments, there might have been more to be said. If the tenant were free to go at any time, and if he had agreed to pay a lump sum premium by instalments in any event, there might have been more to be said. But a premium is a payment for the right which a tenant receives when the lease is signed to occupy the premises for the specified or any shorter period, and that right is of equal value whether he stays there a shorter time or for the whole period. Here the agreement is to pay a sum which varies, not with the value of the right which he receives, but with the amount of use which he makes of it, the time that he stays. The real agreement is that he will pay 25*s.* a week so long as he occupies the premises, and in my opinion that 25*s.* is in truth

and in substance rent within the meaning of s. 1 of the Act of 1920. It has more than once been decided, as the learned county court judge says in his excellent judgment, that the word "rent," like many other technical words in the Rent Restrictions Acts, is not used with a very technical or precise meaning. The county court judge has mainly based his judgment on the view that the landlord could not have distrained for this 11*s.* 6*d.*, or have ejected the tenant for non-payment, and that on an assignment of the term he could not have sued the assignee for it. I do not think it necessary to consider whether any of those three propositions is correct, or if all of them are correct. It might well be that the landlord in those events might find himself in a difficulty in consequence of the form which he has thought fit to give to the documents. But that is not the question. The question is whether this 25*s.* a week is rent within the meaning which Parliament intended to give to the word "rent" when it enacted s. 1 of the Act of 1920.

As I have already said, if the decision appealed against is right the method of evading the Act is very easy. The landlord loses nothing by granting a long lease, as the tenant, so long as he observes the provisions of the Act, can stay there whether the landlord likes it or not. All that the landlord has to do is to grant a lease terminable by the tenant at short notice and stipulate for a premium. It is useless for him to stipulate for a genuine premium, a lump sum down, because people of the class intended to be protected by these Acts could not pay a lump sum; therefore it is necessary for the landlord to spread the premium over weekly payments and to make it terminable with the tenancy. In this way he can get payment for the use of his house in any amount which the tenant's necessities may compel him to agree to.

In my view these Acts are not to be so easily evaded. The judgment must be set aside and judgment entered for the defendant.

Appeal allowed.

Solicitors for appellant: *Hiscocks & Co.*

Solicitor for respondent: *Herbert A. Phillips.*

W. L. L. B.

C. A.

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July 16, 17, 20 : *Nov.* 9.

[IN THE COURT OF APPEAL.]

NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY *v.* H.M. PROCURATOR GENERAL.

International Law—Right of Visit and Search—Jurisdiction of Prize Court—Capture—Jurisdiction of War Compensation Court—Prerogative Rights of the Crown—Indemnity Act, 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-s.* 1 (*b*); *s.* 3 (*a*).

A neutral ship was stopped upon the high seas by one of H.M. Naval Patrols under the belligerent right of visit and search, an armed guard was put on board, and she was ordered to proceed in company with a warship to a British port for her better examination. Her master was not given any formal notice of seizure. On arrival at the port she was searched and, no contraband being found, she was released :—

Held : (1.) That those facts sufficiently amounted to a seizure or capture of the ship in prize to give jurisdiction to the Prize Court to entertain a claim for compensation for her compulsory diversion and detention.

(2.) That the exclusive character of the Prize Court's jurisdiction in all cases in which it exists at all has not been affected by the provisions of the Indemnity Act, 1920.

(3.) That consequently the War Compensation Court had no jurisdiction to entertain the claim.

Quaere, whether the right of visit and search is a "prerogative right of His Majesty" within the meaning of s. 2, sub-s. 1 (*b*), of the Indemnity Act ?

APPEAL from the War Compensation Court.

The claimants, a Dutch company, claimed compensation for the detention of their vessel, the *Sommelsdijk*, while on a voyage from Buenos Ayres to Sweden with a cargo of maize, linseed, and bran. On her arrival in the Downs on October 15, 1915, she was visited by a British examination boat on suspicion of her having contraband of war on board, and partially searched. She was detained at anchor in the Downs until October 26, when an armed guard was put on board and she was told to proceed to London. She was taken to Gravesend accompanied by a torpedo-boat. On her arrival in the Albert Dock on October 29 a search party came on board. The cargo was discharged and the ship thoroughly searched, and no contraband having been found, she was released on December 6. The owners claimed 20,500*l.* for

forty-one days' detention at 500*l.* a day, under s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920 (1), as for an "interference with their property" through the exercise of "a prerogative right of His Majesty" or, alternatively, of a power of search conferred by reg. 51 of the Defence of the Realm Regulations. (2) The Procurator General by his answer took the preliminary objection: (1.) that the claim was not cognizable by the War Compensation Court, as it did not fall within the provisions of the Indemnity Act; and (2.) that the detention complained of was made in the exercise of the belligerent right of visit and search conferred by the law of nations, and was therefore exclusively cognizable by a court of prize. The Compensation Court came to the conclusion that there was "not sufficient evidence to enable them on a preliminary hearing to determine whether the claim was within the jurisdiction of the Prize Court or to ascertain where precisely the first interference with the vessel took place," and being under the mistaken belief that the counsel for the Procurator General assented to that view they reserved those points for a further hearing if necessary. They decided that the claimants could not bring themselves within the Indemnity Act by relying on reg. 51 of the Defence of the Realm Regulations, that regulation having no relation to the belligerent right of visit and search; but being of opinion that the right of visit and search was a prerogative right of the Crown, they held that

(1) By s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, the War Compensation Court has power to award compensation to any person, not being a subject of a state which has been at war with His Majesty, "who has otherwise (than as owner of a requisitioned ship) incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder."

(2) By reg. 51 of the Defence of the Realm Regulations power was given to the competent naval or military authority to enter and search "any house, building, land, vehicle, vessel, aircraft or other premises" which they have reason to suspect "are being or have been, constructed used or kept for any purpose or in any way prejudicial to the public safety or the defence of the realm."

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the Compensation Court had jurisdiction to entertain the claim.

The Procurator General appealed.

Sir Douglas Hogg A.-G., Sir Patrick Hastings K.C. and *Hon. Geoffrey Lawrence K.C.* for the appellant. The War Compensation Court had no jurisdiction under s. 2, sub-s. 1 (*b*), of the Indemnity Act to entertain this claim. The belligerent right of visit and search, in the exercise of which the claimants' ship was brought to London, is not a "prerogative right of His Majesty," but is given to belligerents by international law. It arises not from the common law but jure belli. It may be that the declaration of war is an exercise of the royal prerogative, but the waging of war when declared, and belligerent acts which are incidental to it, such as the visit and search of neutral ships, are not done in the exercise of the prerogative. They are national acts. The prerogative, so far as relates to acts done outside the British dominions, is confined to acts done by the Crown to its own subjects, it does not apply to acts done to neutrals. In *The Zamora* (1) Lord Parker said: "An exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject." And in *In re Ferdinand, Ex-Tsar of Bulgaria* (2), Warrington L.J. said: "I may point out that prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him." In *Commercial and Estates Co. of Egypt* v. *Board of Trade* (3) the requisition of timber, the property of a neutral, in the exercise of the right of angary was indeed held to be made in the exercise of a prerogative right of His Majesty, but there the requisition was made in a port in the United Kingdom. The interferences with a claimant's property dealt with by s. 2, sub-s. 1 (*b*), are expressly limited to interferences "in the United Kingdom," whereas here the original visit and detention of the ship, to which the

(1) [1916] 2 A. C. 77, 92. (2) [1921] 1 Ch. 107, 139.
(3) [1925] 1 K. B. 271.

subsequent removal of her to London and the search were only incidental, took place in the Downs at a place outside the three-mile limit. Bringing the ship into port was merely a continuance of the act done outside that limit, and what was done in port must therefore be regarded as done outside the United Kingdom.

Secondly, the Prize Court had jurisdiction to deal with this matter. On the undisputed facts there was sufficient seizure or capture of the ship in prize to give that court jurisdiction. When she was first detained in the Downs the master was not indeed expressly told that she was seized, but the officer who came on board took away her papers, an armed guard was put on board, she was compelled to proceed to London in company with a torpedo-boat, and when she was eventually released the master was told that she was discharged "by Admiralty orders." Formal seizure is not necessary. In *The Montana* (1) a ship was stopped by a British warship and detained for a time, but eventually allowed to proceed to her destination, her holds having been first sealed, as her cargo was regarded with suspicion. A claim for damages for detention was dismissed by the Prize Court at Malta, the judge holding that "the right of visit and search includes that of securing such part of the cargo which may appear suspicious and of preventing its being discharged at a given port, without actually seizing it." There was no suggestion there of any absence of jurisdiction.

Then if the Prize Court had jurisdiction, that jurisdiction was exclusive. The exclusive character of its jurisdiction in cases in which it exists at all, has always been accepted: per Sir Samuel Evans P. in *The Roumanian*. (2) The reason for this is given in *The Zamora* (3), "The acts of a belligerent power in right of war are not justiciable in its own Courts unless such power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other power. . . . . It follows that but for the existence of courts of prize no one aggrieved by the acts of a belligerent

(1) (1919) 3 Prize Cas. 340, 346. (2) (1914) 1 Prize Cas. 75, 85.
(3) [1916] 2 A. C. 77, 92.

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power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity." There is no precedent for an action at common law for a wrongful exercise of the right of visit and search. That exclusive character of the Prize Court's jurisdiction is not affected by s. 3 of the Indemnity Act, which provides that "nothing in the foregoing provisions of this Act shall (*a*) affect or apply to proceedings in any Prize Court as respects any matter within the jurisdiction of the court."

Le Quesne K.C. and *Sir Robert Aske* for the claimants. The Prize Court had no jurisdiction to deal with this case, for there was no seizure in prize. There is no reported decision in which mere detention without seizure has been held sufficient to give jurisdiction. "The jurisdiction of the Prize Court commences as soon as there is a seizure in prize": per Lord Parker in *The Zamora*. (1) It is essential that what Lord Stowell in *The Hoffnung* (2) called "the hand of capture" should be placed on the ship or goods. The expressions "capture" and "seizure in prize" are treated as synonymous. A mere temporary detention is inconsistent with capture. "The captured vessel becomes a 'prize' only after the captor has taken effective possession of her animo retinendi": Wheaton's International Law, 5th Engl. ed., p. 583. "To constitute a valid capture there must always be some act done manifesting the intention to seize and retain the prize": Upton's Law of Nations affecting Commerce during War, p. 189. Here the putting of armed men on board the ship was quite consistent with the absence of any intention to seize and retain her; it may have been merely for the purpose of insuring that the search should be efficient.

Secondly, the War Compensation Court had jurisdiction; the right of visit and search is a "prerogative right of His Majesty." The exercise of the prerogative is not limited to dealings between the Crown and its own subjects. In Chitty's Prerogatives of the Crown, p. 44, in a chapter headed "Rights incident to the War Prerogative," it is said: "As the constitution of the

(1) [1916] 2 A.C. 77, 108. (2) (1807) 6 C. Rob. Adm. 383, 386.

country has vested in the King the right to make war or peace, it has necessarily and incidentally assigned to him on the same principles the management of the war; together with various prerogatives which may enable His Majesty to carry it on with effect." Amongst the latter is the right of visit and search. On p. 172 the same writer in a chapter on "The Prerogative of Commerce" says: "We have seen that in cases of positive necessity the Crown has the power of laying on a general embargo; and on the same principle of political emergency and absolute necessity, in which embargoes are justifiable, we may rest the King's power to make new declarations of contraband." The matters there referred to are matters arising between the Crown and the subjects of foreign states, and yet they are treated as within the King's prerogative of war.

Thirdly, if the right of visit and search is part of the prerogative, so that the Compensation Court had prima facie jurisdiction under s. 2, sub-s. 1 (*b*), of the Indemnity Act, that jurisdiction is not taken away by s. 3. Para. (*a*) of that section is sufficiently satisfied on the supposition that it was intended only to apply to proceedings commenced before the Act was passed.

Hon. G. Lawrence K.C. in reply. The jurisdiction of the Prize Court does not depend on capture, but on the question whether what was done was done in the exercise of a belligerent right. Lord Parker in *The Zamora* (1) does not in terms say that if there was no seizure there would be no jurisdiction, but that where there is a seizure that is the point at which the jurisdiction begins. But the facts of the present case amounted to capture. That this would clearly have been Oppenheim's view is apparent from § 429, vol. ii., where he says: "From what has already been said . . . . it is obvious that capture may take place either because the vessel, or the cargo, or both, are liable to confiscation, or because grave suspicion demands a further inquiry which can be carried out in a port only."

Cur. adv. vult.

(1) [1916] 2 A. C. 77, 108.

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Nov. 9. The following written judgments were delivered.

BANKES L.J. This appeal from the War Compensation Court raises an important question, and one which, if decided in the claimants' favour, would have far-reaching effect. The claim is that the applicants, as the owners of a neutral vessel which was searched and brought to London in exercise of the belligerent right of visit and search, have a right under the Indemnity Act, 1920, to prefer a claim for compensation before the War Compensation Court. The Procurator General, as representing the Crown, challenged the jurisdiction of the Court. The Court, without coming to any decision on a very material point in the case, overruled the objection to the jurisdiction. The Procurator General appeals.

There is no dispute about the facts, which can be stated quite shortly. Early in the month of October, 1915, the respondents' vessel, the *Sommelsdijk*, was on a voyage from Buenos Ayres to Helsingborg and Malmo with a cargo of maize, linseed and bran. On or about October 15, when the vessel entered the Downs, she was detained by H.M. Naval Patrols and searched, as far as it was possible to search her, without discharging her cargo and bunkers. The detention in the Downs continued until October 25, when an armed guard and a pilot were placed on board, and orders were given that the vessel was to proceed to London, and then, quoting the language of the master in para. 13 of his affidavit: "The ship was taken to Gravesend accompanied by a torpedo-boat from the Edinburgh Channel, and brought to an anchor at Gravesend," and from Gravesend the vessel was taken up into the Royal Albert Dock and there thoroughly searched, her cargo for that purpose being discharged. After the search was completed, the cargo was reloaded, and ultimately on December 5, again quoting the master's language: "The ship was allowed to resume her voyage." The claim as formulated by the owners was for the loss of the use of this vessel from October 25 to December 6, 1915—namely, for forty-one days at 500*l.* per day. In the judgment of the Court, Sir Francis Taylor stated that counsel for both parties

concurred in presenting the case as one in which the vessel had been detained in the Downs and brought to London in exercise of the belligerent right of visit and search. The case was so treated in the arguments before this Court. Two very important questions were raised by those arguments. The first was whether visit and search was an exercise of the prerogative right of His Majesty within the meaning of s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920. The second was whether the claim was one within the jurisdiction of the Prize Court, and, if so, whether it was not, by the terms of the Indemnity Act, excluded from the jurisdiction of the War Compensation Court. The Court appears to have considered that they had not sufficient evidence before them to enable them to decide the second of these two questions, and, as they were apparently under the impression that counsel on both sides agreed to that course, they reserved the question for further consideration. We are assured by counsel for the Procurator General that the Court was under a misapprehension as to his attitude, and that he desired a decision on the evidence as it stood. The counsel for the claimants asks that the matter should be remitted to the Court for their decision. I do not think that this Court should take that course if it is satisfied that it has all the necessary evidence upon which to come to a decision. To do so would merely be to put the parties to unnecessary expense. I propose to rest my judgment upon the view I take of the second question. Sect. 3 (*a*) of the Indemnity Act deals expressly with proceedings in a Prize Court. It provides that "Nothing in the foregoing provisions of this Act shall affect or apply to proceedings in any Prize Court as respects any matter within the jurisdiction of the court." It is argued for the claimants that this provision only applies to proceedings commenced before the passing of the Act. I do not so read the section. The Act is "An Act to restrict the taking of legal proceedings." It assumes a jurisdiction in a court of law to entertain the proceedings it refers to but for the interference of the Legislature; and it uses the expression "proceedings" in reference to future proceedings, as

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well as to those already commenced. The opening words of s. 1, sub-s. 1, make this clear. The provision is that "No action or other legal proceeding whatsoever . . . . shall be instituted in any court of law." I see no reason why the expression "proceedings" in s. 3 should not have the same meaning as in s. 1; indeed I see every reason why they should have the same meaning, and why claims within the jurisdiction of the Prize Court should be excluded from the operation of the Indemnity Act. The Prize Court is a court specially constituted to administer internationally the rules of international law. Those rules recognize an entirely different standard of compensation and of responsibility from that which is accepted by a court of law, using that expression in its ordinary sense. It is for that reason that in matters in which the Prize Court has jurisdiction, its jurisdiction has always hitherto been accepted as exclusive. It would indeed be a strange result if in matters over which a Prize Court undoubtedly has jurisdiction that jurisdiction should be taken away and handed over to a tribunal constituted ad hoc to deal with questions arising out of the late war. It would be still more strange if that tribunal should have contemporaneous jurisdiction with the Prize Court, in which case either court could have jurisdiction to award compensation which had already been refused by the other. I entertain no doubt that the War Compensation Court has no jurisdiction to deal with any matters within the jurisdiction of the Prize Court.

I pass now to consider the jurisdiction of that court, and I will refer to a passage from the judgment of Sir Samuel Evans in *The Roumanian* (1), as containing a comprehensive statement on that subject. He says: "But the jurisdiction and exclusive jurisdiction of the Court of Admiralty in prize was never doubted. 'The nature of the ground of the action—prize or not prize—not only authorises the prize court, but excludes the common law': Lord Mansfield in *Lindo* v. *Rodney*. (2) These functions of the Prize Court have now been allotted to this Division of the

(1) 1 Prize Cas. 75, 85.

(2) (1781) 2 Doug. 615n.

High Court, and contests between the various Divisions would not now occur. It was considered, however, that the Judicature Acts did not render unnecessary the commission which had been issued by the Crown at the beginning of each war; and accordingly a commission was issued at the beginning of this war, in, I think, the same operative terms as the old commissions. By this commission the Court is 'authorised and required to take cognisance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of Admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation.'" The question for decision in the present case is whether the modern practice of carrying out the right of visit and search constitutes a seizure within the meaning of the commission. In the absence of any authority to the contrary it would seem that the means adopted under the present practice of carrying out a visit and search would amply justify a finding of a seizure. What more is wanted than the forcible detention of a vessel, followed by the placing of an armed guard on board in order to compel the carrying out of orders that the vessel is to proceed to some named port and there to remain until allowed to proceed? Oppenheim, in dealing with the question of search of vessels, vol. ii., § 421, says this: "But since search can never take place so thoroughly on the sea as in a harbour, it may be that, although search has disclosed no proof to bear out the suspicion, grave suspicion still remains. In such case she may be seized and brought into a port for the purpose of being searched there as thoroughly as possible." The cases which have come before the Prize Court in consequence of seizures made during the late war appear to have been

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mostly cases where action was taken either under the Order in Council of March 11, 1915, under which vessels might be required to discharge goods at a British or Allied port, or under the Order of February 16, 1917, which authorizes the bringing in of vessels for examination, and, if necessary, for adjudication before the Prize Court. *The Stigstad* (1) and *The Bernisse* (2) are illustrations of this class of case. In both cases the question turned upon whether the conditions giving the right to take action under the Orders in Council existed, but I think that it appears to have been assumed that had the bringing of the vessels into port for the purpose of search taken place under the general right of visit and search, the Prize Court would undoubtedly have had jurisdiction to deal with the claims. Sir Arthur Channell in the second of these cases before the Privy Council (3) suggests that there could be little doubt that the Prize Court would have jurisdiction to exonerate the Crown from liability in a case where reasonable ground existed for exercising the right of search at sea.

The case of *The Roumanian* (4) is more nearly in point. In that case a British vessel in the early days of August, 1914, and before the declaration of war, was on a voyage to Hamburg with a cargo of oil. It was suggested to her owners that in the national interest the vessel should be diverted to a port in the United Kingdom, and this was done, and the oil was discharged into tanks at Purfleet. Proceedings were taken in the Prize Court for condemnation of this cargo. The German owners objected to the jurisdiction on several grounds, and, amongst others, that no act was done manifesting the intention to seize and retain the prize. The act relied upon by the Crown was the delivery of a letter by the Customs House officer to the captain, in which he informed him that the oil "is placed under detention." On this point Lord Parker (5) says this: "It will be observed that the letter giving notice of the detention of the cargo did not

(1) [1916] P. 123; 2 Prize Cas. 179; [1919] A. C. 279; 3 Prize Cas. 347.
(2) (1919) 3 Prize Cas. 517, 771.
(3) 3 Prize Cas. 777.
(4) 1 Prize Cas. 75, 536.
(5) Ibid. 540.

refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter." These authorities appear to me to afford strong confirmation of the view that the action of the Naval Authority in the present case amounted to a seizure which clothed the Prize Court with authority to entertain the claim of the respondents to this appeal. This is sufficient, in my opinion, to dispose of the appeal, and it is unnecessary to express any opinion upon the question whether within the meaning of s. 2, sub-s. 2 (*b*), of the Indemnity Act, 1920, the seizure of the vessel was an exercise of the prerogative right of His Majesty.

In the judgment in the Court below stress is laid upon a passage from a judgment of mine in *Commercial and Estates Co. of Egypt* v. *Board of Trade*. (1) I do not think that anything that I said in that case has any real bearing upon the point with which the War Compensation Court was dealing. In the decision referred to I was dealing with a case in which a claimant's property had been seized under the right of angary, a right which, to use Lord Parker's words, " is generally recognised as involving an obligation to make full compensation." Under such circumstances the question was whether the claimant's case fell within sub-cl. iii. (*a*) or sub-cl. iii. (*b*) of s. 2, sub-s. 2, of the Indemnity Act, 1920 ; in other words, whether but for this Act the claimant would have had a legal right to compensation, or whether the claimant had no such legal right. In choosing between those two alternatives I

(1) [1925] 1 K. B. 283.

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accepted the passage from Lord Alverstone's judgment in the *West Rand Central Gold Mining Co.* v. *The King* (1) as my guide.

In my opinion the appeal succeeds, the decision of the War Compensation Court must be set aside, and a declaration made that that Court has no jurisdiction to entertain the claim. The appellant must have the costs here and below.

SCRUTTON L.J. In this case the War Compensation Court has decided that the Crown's dealing during the Great War with a neutral ship, the *Sommelsdijk*, was an exercise of a prerogative right of His Majesty, and that the War Compensation Court was therefore entitled to consider a claim for compensation by the neutral owners of that ship.

What had happened to the *Sommelsdijk* was agreed by counsel to be that in exercise of the belligerent right of search she had been detained in the Downs, then brought to London with an armed crew of forces of the Crown on board and in charge of one of His Majesty's destroyers, there searched and ultimately released.

It was common ground that before the war the belligerent right of search of neutral vessels was usually exercised at sea, but that during the war the presence of submarines and the size of modern ships led to an extension of that procedure, by which the neutral ship was brought into port for examination, without being necessarily brought before the Prize Court for adjudication. Oppenheim (International Law, vol. ii., § 429) speaks of capture or seizure "because grave suspicion demands a further enquiry which can be carried out in a port only," and (§ 184) that "seizure is effected by securing possession of the vessel through the captor sending an officer and some of his own crew on board," or directing her to steer according to the captor's orders. I cannot doubt that what happened here was a "seizure," the legality of which could be investigated in the Admiralty sitting in Prize, which also would deal with any claim for compensation for undue delay in seizure and examination. The President

(1) [1905] 2 K. B. 391, 406.

informed us that such matters had been frequently dealt with by the Admiralty sitting in Prize, and we were supplied with a list of cases supporting his view. The President's judgment in the *F. J. Lisman* on November 19, 1919 (1), says: "Wrongful detention may give cause for an award of damages by the Prize Court, and any wrongful or vexatious act in the course of the exercise of belligerent rights of seizure or detention may give cause for such an award." Sect. 52 of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), refers any petition of right arising out of the exercise of any belligerent right on behalf of the Crown to the Admiralty. The Admiralty had before the Indemnity Act exclusive jurisdiction in questions of prize "which does not depend on the locality, but the nature of the question, which is such as is not to be tried by any rules of the common law but by a more general law which is the law of nations": per Lee C.J. in *Key & Hubbard* v. *Pearse*, as reported by Buller J. in *Lecaux* v. *Eden*. (2) Also: "The Judge of the Admiralty was judge of the damages and costs as well as of the principal matter": per Lee C.J. in *Rouse* v. *Hassard*, as reported by Lord Mansfield in *Livingston* v. *Mackenzie*, cited in *Lecaux* v. *Eden* (3); see also per Ashhurst J. in *Smart* v. *Wolff*. (4) The Court only gave compensation for unreasonable and unjustifiable delay.

If this was the position before the Indemnity Act, did that Act, whose title stated that it was "to restrict the taking of legal proceedings" and to "provide in certain cases remedies in substitution therefor," affect the hitherto exclusive jurisdiction of the Admiralty, or alter the remedy for acts done in pursuance of belligerent rights? I think s. 3 shows it did not. "Nothing in the foregoing provisions of this Act shall affect or apply to proceedings in any prize court as respects any matter within the jurisdiction of the court." Clearly s. 1 of the Act would not prevent proceedings in a Prize Court, and I find it impossible to suppose that s. 2 was intended to give an alternative and different remedy for matters presumably only cognizable in the Prize Court, in view of the

(1) Not reported.
(2) (1781) Doug. 594, 608.
(3) Doug. 603.
(4) (1789) 3 T. R. 323, 343.

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provisions of s. 3. The War Compensation Court appears to have thought that counsel had agreed to postpone the question whether the matter in dispute was within the jurisdiction of the Prize Court, but counsel for the Crown, referring to the shorthand notes, state that this was a misapprehension.

In my view the Admiralty in Prize had exclusive jurisdiction in this matter, and even if seizure of neutral property for examination in time of war is, as against the neutral, part of the King's prerogative, jurisdiction to entertain claims for compensation for exercise of that part of the prerogative is not conferred on the War Compensation Court by the Act. The Act was passed immediately after the *De Keyser* case (1) had examined the prerogative right of the Crown to seize the goods of a subject without making compensation, and negatived it unless compensation was made. It was this portion of the prerogative that the Indemnity Act was dealing with.

It becomes therefore in my view unnecessary to examine whether, as against a neutral on the high seas, the State in detaining his goods for search does so by "any prerogative right of His Majesty." But I doubt whether the term "prerogative right" has any applicability to such a case. As against an enemy, or a neutral supposed to be assisting an enemy, making war seems to me not a question of "right" but of "force." When the State captures an enemy ship or kills an enemy subject it does not seem to me to be exercising a "right" at all; and though, if you ask who on behalf of the State can decide to capture or kill, the answer may be "His Majesty by his prerogative can bind the State in this matter," this does not give His Majesty any "prerogative right" over belligerents or neutrals. This is the view taken by Warrington L.J. in *In re Ferdinand, Ex-Tsar of Bulgaria* (2): "I may point out that prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him," and I think by Lord Parker

(1) *Attorney-General* v. *De Keyser's Royal Hotel* [1920] A. C. 508.
(2) [1921] 1 Ch. 107, 139.

in *The Zamora* (1), where he says: "An exercise of the prerogative cannot impose legal obligation on anyone outside the King's dominions who is not the King's subject." However, it is not necessary in my view to attempt the thorny task of defining the prerogative, except to say that it is not in the Indemnity Act intended to cover belligerent acts hitherto only cognizable in the Prize Court, if at all.

It only remains to mention *Commercial and Estates Co. of Egypt* v. *Board of Trade* (2), on which the War Compensation Court rely. It is perhaps enough to say that the question of Prize Courts, or whether compensation for the right of angary could be obtained in a Prize Court, or the effect of the Indemnity Act on Prize Court proceedings, was never mentioned or discussed at all. The decision therefore does not bind us in this case, where the effect of the Indemnity Act on Prize Court proceedings is directly raised. But as I think the headnote of that complicated case in the Law Reports is not accurate as far as I am concerned, I say a word about it. The goods in that case were undoubtedly professedly seized under the Defence of the Realm Regulations; the right of angary was never mentioned until after writ. I took the view (p. 289), and I think Bankes L.J. agreed (p. 280), that the War Compensation Court had jurisdiction, for there was a seizure purporting to be under a regulation. Atkin L.J. (p. 297) apparently differed on the ground that it was immaterial that the seizure purported to be under a regulation if the regulation was ultra vires. I thought (p. 287) that this was just the case where the Indemnity Act was wanted. But Bankes L.J. and I differed as to whether a claim for damages came within the principle for payment of price on compensation in s. 2, sub-s. 2 (i.), and Bankes L.J. holding it did not, went on to find "a legal right for compensation" under s. 2, sub-s. 2 (iii.), in the right of angary. I do not think, as stated in the headnote, I "dissented" from the propositions that "the regulations did not apply to a seizure of goods of a neutral brought into the country against his will," or "that the requisition was justifiable in exercise of a prerogative right of angary";

(1) [1916] 2 A. C. 77, 92. (2) [1925] 1 K. B. 271.

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Scrutton L.J.

in the view I took I did not find it necessary to express any opinion on them: see p. 289. The Court did differ on the question whether the Act provided one measure of compensation, and one only, for a seizure purporting to be under regulations, though in fact not justifiable. But as I have said, the effect of the Act on the Prize Court was never mentioned or determined; and the decision does not, therefore, affect the present case.

In my opinion the appeal should be allowed, and judgment entered for the Crown on the claim with costs here and below.

ATKIN L.J. I agree with the other members of the Court that the claim of the neutral owners for compensation was not within the jurisdiction of the War Compensation Court, because it was a matter within the jurisdiction of the Prize Court: see Indemnity Act, 1920, s. 3 (*a*). The jurisdiction in Prize has been stated to be founded upon an original capture. I am not sure that even this proposition is not too widely stated, for example, I find in Story on Prize Courts (Ed. Pratt, 1854, p. 31): "Though a mere maritime tort unconnected with capture jure belli may be cognisable by a court of common law, yet it is clearly established that all captures jure belli, and all torts connected therewith, are exclusively cognisable in the Prize Court." It may well be that a claim for injury to goods or to person made against a person exercising a belligerent right of search on the high seas, though neither vessel nor goods were ever brought in, might be held to be exclusively cognizable in the Prize Court. Good reasons could be adduced why it should. But assuming that there must be a capture as a condition precedent to jurisdiction in Prize, it appears to me that the forcible bringing in of a vessel under an armed guard for purposes of search amounts to such a capture. If there were an immediate intention at the commencement of the operation to bring the vessel in for adjudication, there would be an obvious capture, and in my opinion it makes no difference that the present intention is to bring her in for search, with the further intention if the search results in a particular way to have the vessel or goods

adjudicated. It cannot be doubted that the practice of the Prize Court in this country has been to act on this view. I have no doubt myself that in proper circumstances the owners of a vessel or goods so brought in for search alleging unreasonable delay may apply to the Prize Court for relief, and that the Prize Court has jurisdiction in such a case to order release; and further has jurisdiction to award compensation if the ship has been brought in for search unreasonably or otherwise in the course of the search has been treated unreasonably. It would be remarkable if the result were otherwise, for in the absence of domestic legislation in the belligerent country the neutral owner would apparently be without remedy.

It is unnecessary in this view to consider the question whether the act of bringing in for search and detention within the realm would, apart from the terms of s. 3 (*a*), be said to be "the exercise or purported exercise of any prerogative right of His Majesty." I need only say that by our law the Sovereign declares war and wages war and does so by the prerogative, and that if acts done by members of the naval and military forces of the Crown as belligerent acts are not covered by the Indemnity Act, both as to protection against proceedings and the granting of compensation, the Act would appear to lose much of its value. It must be remembered that under s. 2, sub-s. 1 (*b*), the right of compensation is limited to interference with property or business in the United Kingdom. In the view that I have taken it does not seem to me to be necessary to discuss the angary case: *Commercial and Estates Co. of Egypt* v. *Board of Trade*. (1) I agree that the appeal should be allowed and the claim dismissed with costs here and below.

Appeal allowed.

Solicitor for the appellant: *Treasury Solicitor.*
Solicitors for the claimants: *Botterell & Roche.*

(1) [1925] 1 K. B. 271.

J. F. C.

1925
Nov. 9.

FAGAN *v.* GREEN AND EDWARDS, LIMITED.

[1924. F. 1350.]

Carrier—Carriage of Goods—Exception of Loss by Fire—Fire caused by Negligence of Carriers' Servants—Liability of Carriers.

The defendants, who were furniture removers and warehousemen, entered into a contract to remove the plaintiff's goods from London to Oxford upon certain conditions, one of which was that they would not be responsible for fire. The goods were loaded on a motor-van, and during the course of the transit the van and the plaintiff's goods were destroyed by fire caused by the negligence of the defendants' servants. The plaintiff brought an action against the defendants to recover the value of the goods:—

Held, that the defendants were protected from liability by the condition that they would not be responsible for fire, because not being common carriers, they were not liable for an accidental fire, and unless the condition protected the defendants against liability for a fire caused by their own negligence it would not have any effect.

Turner v. *Civil Service Supply Association* ante p. 50 followed.

In re Polemis and Furness, Withy & Co. [1921] 3 K. B. 560 explained and distinguished.

FURTHER consideration of action tried before Horridge J. and a special jury.

In April, 1924, the defendants, who were furniture removers and warehousemen, agreed to carry certain goods belonging to the plaintiff from London to Oxford in accordance, as the jury found, with their printed conditions and regulations for the removal of goods, the material clauses of which provided as follows:—

3. "The company will not be responsible for fire, but will insure goods without delay upon the receipt of written instructions to do so, and the charges will be placed to the account of the depositor. Goods remain at the owner's risk until the receipt for the insurance is delivered.

4. "The company will not hold themselves liable for any loss or damage which may arise from lightning, civil commotion, or any act of God; neither will they be responsible for moth, rust, or mildew; nor for leakage or ullage of wines or other liquors, or for deterioration or deficiency happening to articles of a perishable nature.

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5. "The company will not under any circumstances be responsible for any article which shall exceed the value of 10*l.*, and the company will not under any circumstances be responsible for the contents of any chest, chest of drawers, articles of furniture, box, or package, unless the same be properly secured to the satisfaction of the company's manager or foreman, nor will they even then be responsible for such contents beyond the sum of 10*l.*"

The plaintiff's goods were loaded on the defendants' motor-van, and on April 25, 1924, while in transit from London to Oxford, the van and the plaintiff's goods were destroyed by fire, occasioned, as the plaintiff alleged, by the negligence of the defendants or their servants.

The plaintiff brought an action against the defendants to recover damages for the loss of his goods.

The jury found that the van was reasonably fit for the carriage of the goods contracted for, and that the defendants took reasonable care to provide a fit and proper van, but that the defendants' servants were guilty of negligence, and that such negligence caused the fire.

Cyril Atkinson K.C. and *Blanco White* for the defendants. The defendants are not common carriers; they were merely bailees of the plaintiff's goods, and the only obligation on them was to use reasonable care, and therefore, apart from the special contract, they would only be liable for negligence. Clause 3 of the contract expressly provides that the defendants "will not be responsible for fire." That clause can only mean that the defendants would not be responsible for fire arising from the negligence of the defendants or their servants, otherwise the clause would not have any effect, as the defendants, not being common carriers, would not be liable for loss arising from an accidental fire. The case is covered by a decision of Sankey J. in *Turner* v. *Civil Service Supply Association, Ld.* (1), where the facts were almost identical with the facts in the present case. In that case Sankey J. held that a clause similar to cl. 3 protected the carriers against

(1) Ante, p. 50.

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liability for a loss from a fire caused by the carriers' negligence. Further, the defendants by cl. 5 limited their liability even though the loss arose from negligence, as they said that they would not "under any circumstances" be responsible for any article exceeding the value of 10*l*. In contracts by common carriers words of general exemption from liability do not relieve the carrier from liability where there has been negligence on the part of the carrier or his servants: *Price & Co.* v. *Union Lighterage Co.* (1) But protection has been given against the consequences of the carriers' negligence in several cases where the exemption clause was in similar terms to cl. 5 in the present case. In *Taubman* v. *Pacific Steam Navigation Co.* (2) the words used were "under any circumstances whatsoever." In *Thompson* v. *Royal Mail Steam Packet Co.* (3) the words were "in any circumstances." In *Haigh* v. *Royal Mail Steam Packet Co.* (4) the defendants were not to be responsible for loss "under any circumstances." In *The Stella* (5) the exception was for "any injury, delay, loss or damage however caused." In *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.* (6) the words of the exception clause were "whatever may be the nature of such accident or damage or howsoever arising." In *Joseph Travers & Sons, Ld.* v. *Cooper* (7) the words were "for any damage to goods however caused." In the latter case Phillimore L.J. pointed out (8) that if attention was directed to the causes of any loss by the use of such words as "any loss," "however caused," or "under any circumstances," it was not necessary to say in express terms "whether caused by my servants' negligence." It is clear from *Williams* v. *Midland Ry. Co.* (9) that cl. 5 is a reasonable condition.

Charles K.C. and *James Wylie* for the plaintiff. The defendants are not protected against liability by cl. 3 in their contract. It was held by the Court of Appeal in *In re Polemis*

(1) [1903] 1 K. B. 750; [1904] 1 K. B. 412.
(2) (1872) 1 Asp. M. L. C. 336.
(3) (1875) 5 Asp. M. L. C. 190n.
(4) (1883) 52 L. J. (Q. B.) 640; 5 Asp. M. L. C. 189.
(5) [1900] P. 161.
(6) [1914] 2 K. B. 788.
(7) [1915] 1 K. B. 73.
(8) Ibid. 101.
(9) [1908] 1 K. B. 252.

and Furness, Withy & Co. (1) that an exception of "fire" in a charterparty did not protect the charterers against loss by fire caused by the negligence of their servants, there being no clear words excluding liability for negligence. The charterers in that case were not common carriers, and therefore were in the same position as the defendants in the present case—namely, only liable for negligence. That case is in direct conflict with the decision of Sankey J. in *Turner* v. *Civil Service Supply Association* (2), and does not appear to have been cited to him. A number of causes of loss are excepted in cl. 4 besides fire, all of which might arise without any negligence on the part of the defendants. If therefore negligence is not specifically excepted and a loss arises from fire or one of the other causes specifically mentioned caused by the negligence of the defendants they will not be protected by the exception from liability. In several of the cases cited as authorities in support of the contention that the defendants are protected notwithstanding that the fire was caused through their negligence, the exceptions clause contained the words "however caused" or words to the like effect, e.g., *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.* (3); *The Stella* (4); *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (5), where the words were "from whatever other cause arising." The words "under any circumstances" in cl. 5 only exempt from liability if they stand by themselves, but in the present case there is in cl. 4 a specific exception of many causes of loss. Clause 5 must be read in connection with the rest of the contract, and when it is so read the words "under any circumstances" apply only to the circumstances appearing in the contract itself, and the clause is not a complete denial of liability. The words used are often "under any circumstances whatsoever": see *Taubman* v. *Pacific Steam Navigation Co.* (6) Clause 5 is really a depository clause, and does not deal with removals.

(1) [1921] 3 K. B. 560.
(2) Ante, p. 50.
(3) [1914] 2 K. B. 788.
(4) [1900] P. 161.
(5) (1883) 8 App. Cas. 703.
(6) 26 L. T. 704; 1 Asp. M. L. C. 336.

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Cyril Atkinson K.C. in reply. *In re Polemis and Furness, Withy & Co.* (1) is distinguishable, because in the case of a fire on board ship caused by the negligence of the shipowner or his servants the shipowner would be liable notwithstanding an exception of fire unless there were also clear words excluding negligence, inasmuch as the shipowner is a common carrier. One rule of construction of an exception in a charterparty cannot be adopted in the case of a shipowner and another in the case of charterers, and for that reason the charterers were held liable.

HORRIDGE J. In this case the plaintiff claims for the loss which he has sustained through the damage to his goods occasioned by a fire which broke out on the lorry on which they were being conveyed from London to Oxford. At the trial before myself and a special jury the jury found, in answer to a question by me, that the cause of the fire was the negligence of the defendants' servants. In those circumstances the defendants would be liable if it were not for the terms of the special contract under which they are found by the jury to have carried the plaintiff's goods.

The first exception relied upon is No. 3: "The company will not be responsible for fire, but will insure goods without delay upon the receipt of written instructions to do so, and the charges will be placed to the account of the depositor. Goods remain at the owner's risk until the receipt for the insurance is delivered." It is said on behalf of the defendants that the only thing to which that clause can refer is the negligence of the defendants' servants. It is not contended here that the defendants are common carriers, and therefore they are in the position of bailees and are only bound to take reasonable care of the goods committed to their charge. It is said therefore on behalf of the defendants that as the only thing they could be liable for in this case was negligence, in order to give a meaning to this exception it is necessary to hold that it covers negligence.

I need not go through all the cases on the subject, but in

(1) [1921] 3 K. B. 560, 572, 573.

every case where the defendants have been held liable, with the exception perhaps of a case in the Court of Appeal, the defendants were in the position of common carriers, and therefore would have been liable for loss of the goods apart from negligence, unless they could prove that the loss was due either to the act of God or the King's enemies. I am not now referring to the class of cases where special words are added to the exception clause. That class of case I shall have to refer to when I deal with cl. 5. There are no special words such as "howsoever caused" or "under any circumstances whatever," qualifying in any way cl. 3.

The case in the Court of Appeal to which I referred is *Joseph Travers & Sons, Ld.* v. *Cooper.* (1) In the judgments of two of the learned Lords Justices, Buckley and Phillimore L.JJ., a distinction is clearly drawn between the liability of a common carrier and the liability of a bailee as affecting the construction to be put upon an exception clause with reference to the question of negligence. Kennedy L.J.'s judgment is a little more ambiguous, because he says (2): "In the present case, whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent. Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words 'however caused' I am of opinion that he would not be, and that the decision of this Court in *Price & Co.* v. *Union Lighterage Co.* (3) affirming the judgment of Walton J. (4), which is referred to by Pickford J. in his judgment in the present case, would bind us so to hold." I do not think that Kennedy L.J. is there saying that it is immaterial to consider whether he was a common carrier or not, but I think he is saying that having regard to the words "however caused," which would apply even to the case of a common carrier, he does not think it is

(1) [1915] 1 K. B. 73.
(2) [1915] 1 K. B. 93.
(3) [1904] 1 K. B. 412.
(4) [1903] 1 K. B. 750.

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necessary to consider accurately whether the defendant in that case was a common carrier or not.

There is no doubt that the case which is most directly in point is *Turner* v. *Civil Service Supply Association, Ld.* (1), before Sankey J., and I can see nothing which enables me to distinguish that case from the present case. In that case the clause was, "The contractors are not responsible for loss or damage caused by fire." The facts of that case were strangely like the facts in this case. Sankey J. there held that as there was no alternative construction to give to that clause than to hold it applied to a fire caused by the negligence of the defendants, he was bound to give that meaning to it. That decision is directly in point, and would in the ordinary course be followed by any judge of the King's Bench Division, even if it did not exactly appeal to him; but in this case it does appeal to me; I think the judgment is right, and I propose to follow it.

The only case which has given me any trouble is the decision of the Court of Appeal in *In re Polemis and Furness, Withy & Co.* (2) In that case the charterers of a vessel were guilty of negligence, through their servants, by which the vessel got on fire, and it was there held that they were not protected by an exception of "the act of God, the King's enemies, loss or damage from fire." Now in that case the charterers would be under no liability except for negligence, and therefore at first sight it struck me as being a case which presented a real difficulty in deciding in favour of the defendants in this case, because the Court of Appeal there held that, although the charterers could only be liable for fire caused by negligence, an exception from fire did not protect them against loss by fire caused by the negligence of their servants. I think the ground of that decision was due to the words contained in the exception clause in most charterparties, and also in the exception clause in that charterparty—namely, "always mutually excepted," which means that the clause containing the exceptions operates for the benefit of the shipowner and the charterers

(1) Ante, p. 50. (2) [1921] 3 K. B. 560.

mutually, and that because in the case of the shipowner the Court of Appeal would have been obliged by the decisions to put upon the exception the construction that it did not protect the shipowner, who was a common carrier, that therefore the mutual interpretation of that clause was that it operated in the same way in the case of the charterers, and that because under that exception, which had to cover both the shipowner and the charterers, if the shipowner would not have been liable the charterers would also not be liable, but as in the circumstances the shipowner would have been liable the charterers were therefore equally liable. Bankes L.J. said (1): "I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence." And Warrington L.J. said (2): "It appears to be well settled that in such a contract as the present the exceptions would not be construed so as to excuse the shipowner for loss of the nature described if caused by the negligence of himself or his servants, unless expressly so framed: Carver on Carriage by Sea, ss. 14, 22; and as to bills of lading per Bowen L.J. in *Steinman* v. *Angier Line* (3); and in my opinion the same construction must be given to the clause when it is the liability of the charterers which is in question." I therefore think the ground of that decision was that one construction must be put upon the exception applicable to both charterers and shipowner; that inasmuch as the shipowner would not be protected therefore the charterers would not be protected. I do not think that case affects the decision of Sankey J. in *Turner* v. *Civil Service Supply Association* (4), that where the only interpretation that can be given to such a clause is to make it applicable to negligence, that then the carrier

(1) [1921] 3 K. B. 572.
(2) [1921] 3 K. B. 573.
(3) [1891] 1 Q. B. 619, 623.
(4) Ante, p. 50.

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is excepted from liability. In the present case I think the carriers were excepted from liability because a fire, caused by the defendants' negligence, was the only fire which could have been intended to be covered by the exception, and that therefore the exception protected them.

As regards the exception from liability contained in cl. 5, that question does not arise if I am right on the first point; but I think it is quite clear, on the authority of *Haigh* v. *Royal Mail Steam Packet Co.* (1), that the words "under any circumstances" cover the negligence of the defendants' servants, and that therefore they are protected by that clause, although the loss was occasioned by the negligence of their servants. The result of that decision would be that the plaintiff would not under the first portion of cl. 5 be able to recover for the loss of any article exceeding the value of 10*l.*, and that under the latter portion of the clause if the contents of any chest of drawers or packages are worth more than 10*l.* the plaintiff would not be able to recover in respect of that package more than 10*l.*

Judgment for defendants.

Solicitors for plaintiff: *Martineau & Reid.*
Solicitors for defendants: *Macdonald & Stacey.*

(1) 52 L. J. (Q. B.) 640; 5 Asp. M. L. C. 189.

R. F. S.

JENKINS AND COMPANY *v.* SIMON.

1925
Oct. 16.

County Court—Costs—Remitted Action—Order in High Court under Order XIV. *of Rules of Supreme Court for Leave to sign Judgment for more than Twenty Pounds—Payment into County Court of Balance of Plaintiff's Claim—Costs of Proceedings in High Court—Whether taxed on High Court or County Court Scale—Discretion of County Court Judge—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 113—*County Courts Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 73), *ss.* 1, 11, 12.

The plaintiffs brought an action in the High Court to recover 23*l.* 18*s.* 11*d.*, the balance of an account for work and labour done. They obtained an order under Order XIV., within twenty-one days after service of the writ, that unless the defendant paid 21*l.* within seven days the plaintiffs should be at liberty to sign judgment for that amount. The defendant was given leave to defend as to the balance of the plaintiffs' claim, and the action was remitted to a county court. The defendant paid 21*l.* within the seven days. The case was set down for hearing in the county court, but the defendant paid the balance of the plaintiffs' claim into the county court shortly before the day fixed for the hearing. The plaintiffs then applied to have the costs of the action to be taxed on the High Court scale down to the date of the transfer and after that date on the county court scale. The county court judge gave the plaintiffs the costs of the action to be taxed on the county court scale, as in his opinion it was a case that ought to have been brought in the county court, and no good reason had been shown for the proceedings having been brought in the High Court :—

Held, (1.) that, under ss. 11 and 12 of the County Courts Act, 1919, where an action has been transferred from the High Court to a county court the costs of the whole proceedings, both before and after the transfer, are, subject to any order of the Court which ordered the transfer, in the discretion of the Court to which the action is transferred, and that Court has power to make orders with respect thereto, and that therefore the county court judge had jurisdiction to make the order which he made, but (2.) that the county court judge in making the order as to costs had not exercised his discretion judicially. The plaintiffs, in the events that had happened, were entitled under s. 11 of the Act of 1919 to High Court costs unless they had been guilty of misconduct. The mere fact that they did a thing which prima facie entitled them to High Court costs was not misconduct.

Appeal from Leeds county court.

The plaintiffs brought an action in the High Court against the defendant to recover 23*l.* 18*s.* 11*d.*, the balance of money due for work and labour done and materials supplied. A summons was taken out by the plaintiffs under Order XIV. for leave to sign judgment. The defendant did not deny that

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21*l.* was due to the plaintiffs, but he denied that any further sum was due. The district registrar made an order on January 7, 1925, which was made within twenty-one days from the service of the writ, that unless the defendant within seven days paid to the plaintiffs 21*l.* the plaintiffs were to be at liberty to sign judgment for that amount. The defendant was given leave to defend the action as regards the residue of the plaintiffs' claim, and the action was remitted to the Leeds County Court. The defendant paid the 21*l.* within the seven days allowed by the order, and therefore no judgment was signed in the High Court.

The action then proceeded in the county court in respect of 2*l.* 18*s.* 11*d.*, the balance of the plaintiffs' claim, and February 26, 1925, was fixed for the hearing, but three days before that date the defendant paid the 2*l.* 18*s.* 11*d.* into court, and therefore there was no necessity to proceed with the hearing of the case. The plaintiffs' solicitor, however, applied to the county court judge on February 26 for an order for costs on the High Court scale up to the time of the transfer of the action to the county court and on the county court scale subsequent to the transfer. The county court judge did not accede to that application, but made an order for the taxation of the costs of the whole action on the county court scale. He subsequently gave a note of the reasons for his decision as follows: "In the exercise of my discretion I was of opinion it was a case that ought to have been brought in the county court, and no good reason was shown for the proceedings to be brought in the High Court."

The plaintiffs appealed.

R. J. Sutcliffe for the plaintiffs. The plaintiffs are entitled under the second proviso to s. 11 of the County Courts Act, 1919, to costs on the High Court scale in respect of the proceedings in the High Court before the action was transferred to the county court, and the county court judge had no jurisdiction to make an order depriving the plaintiff of those costs. Under s. 116 of the County Courts Act, 1888, which was replaced by s. 11 of the 1919 Act, the plaintiffs would

have been entitled automatically to costs on the High Court scale, but in the second proviso to s. 11 of the 1919 Act the words " unless otherwise ordered by the court or a judge " are introduced, which are absent in s. 116 of the earlier Act. The words " Court or a judge " do not refer to a county court at all; they are never used in connection with a county court judge. The words are used earlier in the same section when they clearly refer to the High Court, and therefore they must have the same meaning when they appear again in the second proviso. That section gives a county court judge no power to interfere with the costs of High Court proceedings in the case of a remitted action. The word " Court " is defined in s. 186 of the 1888 Act as meaning the judge or registrar of a county court, and therefore if the words " Court or a judge " in s. 11, proviso 2, be held to include a county court judge, the registrar of a county court would also have jurisdiction to make an order disallowing costs on the High Court scale of the proceedings in the High Court. Under s. 12 of the 1919 Act, where an action or matter is transferred from the High Court to a county court the costs of the whole proceedings, both before and after the transfer, are in the discretion of the Court to which the matter is transferred, subject to any order of the Court which ordered the transfer. The section contains a proviso that " as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer, the costs thereof shall be subject to the provisions of " s. 11 " and the powers of the Court or a judge under that section to make an order allowing costs on the High Court scale or on or under any county court scale or column shall, subject to any order of the Court or judge by whom the transfer was ordered, be exerciseable by the judge of the county court." That proviso enables a county court judge to exercise the powers of a Court or a judge with regard to allowing costs on the High Court scale of proceedings in the High Court, under the first proviso to s. 11, but it does not enable a county court judge to exercise any discretion under the second proviso of s. 11 with

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regard to disallowing the costs on the High Court scale of High Court proceedings in the case of a transferred action. The proviso to s. 12 expressly gives the county court judge power to allow costs on the High Court scale, but no power has been given to a county court judge to disallow costs on the High Court scale: see Annual County Court Practice for 1925, pp. 1005-6. That strongly supports the contention that the provision in the second proviso to s. 11 with regard to disallowing High Court costs can only be exercised by the High Court and not by the county court.

If however the county court judge had jurisdiction over the costs of the proceedings in the High Court, he has not exercised his discretion under s. 11 judicially in depriving the plaintiffs of their costs on the High Court scale of the proceedings in the High Court. The plaintiffs were entitled to bring their action in the High Court as they recovered more than 20*l.* under Order XIV. within the twenty-one days specified by the second proviso to s. 11: see *Barker* v. *Hempstead* (1) per Field J. The county court judge's reason for disallowing the plaintiffs' costs on the High Court scale—namely, that in his opinion the action ought to have been brought in the county court and not in the High Court—was therefore an erroneous one. "Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs": *Cooper* v. *Whittingham* (2), per Jessel M.R. The plaintiffs in the present case have not been guilty of any misconduct entitling the county court judge to deprive them of their costs: see *Hudsons, Ld.* v. *De Halpert.* (3) In the present case the county court judge knew nothing about the action, because it was brought in the High Court, and the greater part of the plaintiffs' claim was recovered there, the action as regards the balance of the claim being remitted to the county court, but that balance was paid into Court before the hearing, and

(1) (1889) 23 Q. B. D. 8, 10. (2) (1880) 15 Ch. D. 501, 504.
(3) (1913) 108 L. T. 416.

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therefore the county court judge had no materials which justified him in depriving the plaintiffs of their High Court costs.

H. I. P. Hallett for the defendant. A county court judge has, by virtue of s. 113 of the County Courts Act, 1888, a general discretion over costs. It was held in *Everall* v. *Brown* (1) that where an action is remitted to a county court the judge has the same discretion over costs under s. 113 as if the action had been commenced in the county court, and that s. 65 of the County Courts Act, 1888, did not take away that general discretionary power. Sect. 65 of the 1888 Act is now replaced by s. 1 of the County Courts Act, 1919. Under s. 65 of the 1888 Act the costs of the order of the judge of the High Court ordering the transfer to the county court "and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court." It was argued in *Everall* v. *Brown* (1) that the discretion given to the Court over costs by s. 113 was limited to cases "not herein otherwise provided for," and that the costs of remitted actions were otherwise provided for by s. 65, but that contention was not accepted by the Court. The discretion of a county court judge under s. 113 over costs in the case of a remitted action has not been fettered by ss. 11 and 12 of the Act of 1919. Under s. 12 the costs of an action remitted to a county court, both before and after the transfer, are in the discretion of the county court judge. Field J. pointed out in *Barker* v. *Hempstead* (2) that the recovery of judgment under Order XIV. was not in every case a sufficient reason for suing in the High Court. Under the Act of 1888 if an order was obtained within twenty-one days of the service of the writ, empowering the plaintiff to sign judgment for a sum of 20*l.* or upwards, the plaintiff was entitled to High Court costs. Now under the second proviso to s. 11 of the 1919 Act the plaintiff is entitled to High Court costs "unless otherwise ordered by the Court or a judge." "The Court or a judge" in that proviso means the Court or judge who tries the action. It is clear that in the first

(1) [1905] 2 K. B. 196; [1906] 2 K. B. 884.
(2) 23 Q. B. D. 10.

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proviso the "Court or a judge," which is contemplated as making the order as to costs, is the Court or judge before whom the matter is tried, and there is no reason for giving a different meaning to the words "Court or a judge" in the second proviso. Sect. 12 provides that "the costs of the whole proceedings, both before and after the transfer or removal, shall, subject to any order made by the Court which ordered the transfer or removal, be in the discretion of the Court to which the matter is transferred." The discretion of a county court judge under that section is fettered only to the same extent and in the same way as if the proceedings had continued in the High Court. The Court is not entitled to allow costs on the High Court scale unless it is satisfied that there was a proper reason for bringing the action in the High Court. The proviso to s. 12 does not impose a greater limitation upon a county court judge with regard to the exercise of his discretion than is imposed upon a judge of the High Court.

[SALTER J. The proviso to s. 12 enacts that the powers of a Court or judge under s. 11 to make an order allowing costs on the High Court scale shall be exerciseable by the judge of the county court. It, however, does not say that a judge of the county court shall have power to disallow costs on the High Court scale.]

The first part of s. 12 is sufficiently wide to give power to a county court judge to disallow costs. The only limitation upon that power is the same limitation as a judge of the High Court is under.

If a county court judge has exercised his discretion with regard to costs the Divisional Court will not review the exercise of that discretion unless it is proved that the county court judge acted upon a wrong principle. In the present case there is no evidence that the county court judge was acting according to a rule or settled policy which he had laid down for himself.

SALTER J. In this case the plaintiffs sued in the High Court to recover 23*l.* 18*s.* 11*d.*, the balance of an account for

work and labour done. They obtained an order under Order XIV., within twenty-one days after service of the writ, that unless the defendant paid 21*l.* within seven days the plaintiffs should be at liberty to sign judgment for that amount: leave to defend as to the balance: action remitted to the county court. The 21*l.* was paid within the seven days. The balance of the claim, 2*l.* 18*s.* 11*d.*, was paid into the county court shortly before the date fixed for hearing. Only costs remained, and the plaintiffs asked for the costs of the action to be taxed on the High Court scale down to transfer, and after that on the county court scale. The learned judge gave the plaintiffs the costs of the action, but ordered that all the costs should be taxed on the county court scale. The plaintiffs appeal, and ask for costs in accordance with their application.

The appeal raises two questions—namely, whether the learned judge had jurisdiction to make the order, and whether, if so, he exercised his discretion judicially.

Sect. 113 of the County Courts Act, 1888, gives to county court judges, in wide general terms, jurisdiction over the costs of county court actions. Sect. 1 of the County Courts Act, 1919, gives power to the High Court to transfer to a county court actions commenced in the High Court. Sect. 11 of that Act deals with the costs of actions brought in the High Court which could have been commenced in a county court, and provides that successful plaintiffs shall recover, in some cases no costs and in some cases only county court costs, according to the amount recovered. The second proviso to s. 11 is as follows: "If in any action founded on contract the plaintiff within twenty-one days after the service of the writ, or within such further time as may be allowed by the Court or a judge, obtains an order under Order XIV. of the Rules of the Supreme Court that he shall be at liberty to sign judgment for a sum of twenty pounds or upwards either unconditionally or unless that sum is paid into Court or to the plaintiff's solicitor, he shall, unless otherwise ordered by the Court or a judge, be entitled to costs on the High Court scale." Sect. 12 of the same Act deals with the costs of transferred actions, and as regards actions transferred from

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the High Court to a county court, provides that "the costs of the whole proceedings both before and after the transfer or removal shall, subject to any order made by the Court which ordered the transfer or removal, be in the discretion of the Court to which the matter is transferred or removed, and that Court shall have power to make orders with respect thereto and as to the scales or columns on or under which the costs of the several parts of the proceedings are to be taxed, and the costs of the whole proceedings shall be taxed in that Court." It is difficult to imagine wider words than these. Then follows this proviso: "Provided that, as regards so much of the proceedings in any action transferred from the High Court to a county court as take place in the High Court before the transfer, the costs thereof shall be subject to the provisions of the last foregoing section of this Act, and the powers of the Court or a judge under that section to make an order allowing costs on the High Court scale or on or under any county court scale or column shall, subject to any order of the Court or judge by whom the transfer was ordered, be exerciseable by the judge of the county court." Counsel for the defendant argued that the word "allowing" in this proviso is limited to increasing the normal scale of costs and did not cover disallowance, total or partial. I think this is too narrow a reading, and that the word "allow" is equivalent to "award." I think that these sections, read together, show that in the case of actions transferred to a county court the Legislature intended, subject to any order of the transferring Court, that the whole discretion over all costs of the action should be with the county court judge. The learned judge therefore had jurisdiction to make the order.

The remaining question is whether he exercised his discretion judicially. He has given his reasons as follows: "In the exercise of my discretion I was of opinion it was a case that ought to have been brought in the county court, and no good reason was shown for the proceedings to be brought in the High Court." I think this is not a judicial exercise of the discretion. The plaintiffs had been completely successful and had recovered in the action every penny of their claim.

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There was, therefore, no discretion to deprive them of costs unless for some misconduct. In the events which had happened they were entitled to High Court costs up to transfer unless guilty of misconduct. To say that they were guilty of misconduct because they did a thing which, prima facie, entitles them to High Court costs, and for no other reason, is to nullify the second proviso to s. 11.

The appeal must be allowed and the order as to costs varied by directing that the costs to the date of transfer be taxed on the High Court scale.

FRASER J. I am of the same opinion and for the same reasons.

Appeal allowed.

Solicitors for plaintiffs: *Church, Adams, Tatham & Co., for J. H. Milner & Son, Leeds.*

Solicitors for defendant: *Rawle, Johnstone & Co., for L. Godlove, Leeds.*

R. F. S.

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[1924. C. 4866.]

Moneylenders—Harsh and unconscionable Transaction—Reopening Whole of Transactions between Parties—Former Transaction Subject of consent Judgment in another Action—Jurisdiction of Court to reopen that Transaction—Moneylenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1.

By s. 1, sub-s. 1, of the Moneylenders Act, 1900: "Where proceedings are taken in any Court by a moneylender for the recovery of any money lent, ... and there is evidence which satisfies the Court that . . . . the transaction is harsh and unconscionable, ... the Court may reopen the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges. . . . .":—

Held, that this section does not enable a Court to reopen previous

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transactions between the parties which have been the subject matter of a former action, and in which a judgment has been given, even although that judgment was the result of an agreement between the parties.

ACTION tried by Finlay J. under Order XIV.

The action was brought by the plaintiff, a registered moneylender, against the defendant upon two promissory notes for 1000*l.* and 200*l.* respectively, dated June 13, 1924. The note for 1000*l.* was repayable by instalments, with a provision that the whole amount should become due upon default in payment of any of the instalments. The plaintiff alleged that there had been default in payment of one of the instalments. The note for 200*l.* was payable on demand, and the plaintiff alleged that it had been dishonoured. Each of the promissory notes contained a provision for payment of interest at the rate of 5 per cent. per month from the date of maturity until payment thereof. The plaintiff obtained summary judgment for 40*l.*, but the defendant was given leave to defend as to the balance of the plaintiff's claim.

The defendant set up as a defence that the transaction was harsh and unconscionable.

Finlay J. on January 26, 1925, held that the transaction was harsh and unconscionable, and directed an inquiry upon the basis that the plaintiff was only entitled to interest at the rate of 20 per cent. per annum. He also directed that the whole of the transactions between the parties should be reopened.

There had been a previous transaction between the parties in respect of which an action had been brought by the plaintiff against the defendant, in which the plaintiff claimed a sum of 1542*l.*, as being due on two promissory notes for 1500*l.* and 350*l.* The defendant set up as a defence to that action that the interest charged was harsh and unconscionable. But when that action came on for trial on April 30, 1924, the defendant by his counsel submitted to judgment, and Avory J. directed that "judgment should be entered for the plaintiff for 992*l.*, being the balance now remaining due with costs; and further directed that the judgment be not drawn up and entered provided: (1.) The costs are paid by defendant

within seven days from the date of taxation or agreement; (2.) the defendant pays to the plaintiff the sum of 375*l.* on or before May 30, 1924; and (3.) the defendant pays to the plaintiff the sum of 375*l.* on or before June 30, 1924."

The judgment was not drawn up and entered, as the defendant paid the costs and the first instalment as arranged, and before the second instalment became due the present transaction was entered into, the plaintiff being paid the second instalment out of it.

The inquiry in the present action was taken by Master Jelf, who certified that upon the first transaction, which was the subject of the action tried before Avory J., the plaintiff had received in all a total sum which exceeded by 378*l.* the sum which would be due to the plaintiff if the actual moneys advanced had been repayable on a running account with interest at the rate of 20 per cent. per annum. Upon the second transaction, represented by the two promissory notes which were the subject of this action, the Master certified that if the actual moneys advanced—namely, 550*l.*—had been repayable on a running account with interest at the rate of 20 per cent. per annum the sum which would be due to the plaintiff would be 104*l.* If the defendant was entitled to credit for the 378*l.*, that would reduce the loan on the second transaction to 172*l.* The Master certified that in that event the plaintiff had been overpaid in respect of the second transaction 310*l.* in excess of the amount actually advanced and interest at 20 per cent.

Sir W. S. Schwabe K.C. applied for leave to file a counterclaim claiming repayment of the sum overpaid in accordance with the Master's report.

Barrington-Ward K.C. and *M. Hilbery* for the plaintiff. The Court had no jurisdiction under s. 1, sub-s. 1, of the Moneylenders Act, 1900, to make an order reopening the first transaction, because that was the subject of a judgment and was therefore closed. The section provides that "where proceedings are taken in any Court by a moneylender for the recovery of any money lent . . . . and there is evidence which

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satisfies the Court that . . . . the transaction is harsh and unconscionable . . . . the Court may reopen the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them. . . . ." That section only gives power to reopen a transaction which has been closed by a statement or settlement of account or by an agreement. It does not give the Court power to reopen a transaction which has been the subject of a judgment in another action between the parties. A judgment of the King's Bench Division is final and conclusive, and another Court of the King's Bench Division has no power to go behind it. If it had been intended to give a Court power to reopen a moneylending transaction, notwithstanding that it had been the subject of a judgment in an action between the parties, a judgment would have been expressly mentioned in the section as being in the same category as a statement or settlement of account or an agreement. There is no decision directly in point. It is too late to apply now for leave to file a counterclaim. That should have been filed when the action was tried on January 26, 1925.

Sir W. S. Schwabe K.C. and *H. Simmons* for the defendant. The order of the Court that the whole of the transactions between the parties should be reopened was a good order. The fact that there was a consent judgment in the former action would not prevent the Court ordering the whole of the transactions between the parties to be reopened under the Moneylenders Act, 1900. That Act is framed in very wide terms, and unless an action between the parties with regard to former transactions has been thoroughly tried out the Court has power under the Act to reopen the transactions which were the subject of the former action and of the consent judgment. *Samuel* v. *Bell* (1) shows that a transaction can be reopened after the payment of the amount had been made consequent upon the pressure of a writ of summons in an

(1) (1905) 22 Times L. R. 118.

action. The same principle applies to a consent judgment. Avory J. had no power to make the judgment in the former action in the way he did except by the consent of the parties, and therefore it comes within the term "agreement" in s. 1 of the Act. Judgment in the former action was never entered, and therefore it was not an effective judgment.

Barrington-Ward K.C. in reply. A judgment is an effective judgment from the day when it is pronounced by the judge in Court, and takes effect from that date and not from the date of the entry: *Holtby* v. *Hodgson*. (1)

FINLAY J. This case raises a point under the Moneylenders Act, 1900, which has apparently never been decided before. The position is a curious one. This action was brought by the plaintiff, a moneylender, against the defendant, who is a Roumanian living in England, in respect of certain sums lent by the plaintiff to the defendant. It came before me a considerable time ago. I then held that the transaction was harsh and unconscionable, and directed it to be reopened, the moneylender to have interest at the rate of 20 per cent. per annum upon the money he had lent; but I went further, because I directed that the whole of the transactions between the parties should be reopened. Thereupon an inquiry was held by Master Jelf, and he has given his certificate.

Mr. Barrington-Ward has now taken a point under s. 1 of the Moneylenders Act, 1900, and, as I said a few moments ago, it certainly is very remarkable that so many years after the Act was passed this point should apparently be entirely uncovered by authority, but so it is, because the united industry of Sir Walter Schwabe and Mr. Barrington-Ward only succeeded in discovering one case, which, it is agreed by both sides, does not really decide the point at all.

What happened was this: There had been previous transactions between these parties, and there is no doubt that I intended that those transactions should be reopened. It

(1) (1889) 24 Q. B. D. 103, 107.

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appears that in respect of those previous transactions an action was commenced by the plaintiff against the defendant, in which the plaintiff claimed a sum of 1542*l.* That action followed its ordinary course until it came on for trial. Thereupon the defendant by his counsel submitted to judgment, and Avory J. directed that "judgment should be entered for the plaintiff for 992*l.*, being the balance now remaining due with costs, and further directed that the judgment be not drawn up and entered provided: (1.) the costs are paid by the defendant within seven days from the date of taxation or agreement; (2.) the defendant pays to the plaintiff the sum of 375*l.* on or before May 30, 1924; and (3.) the defendant pays to the plaintiff the sum of 375*l.* on or before June 30, 1924." I entertain no doubt at all that that was a judgment of Avory J., and that it was not the less a judgment because the defendant, who had on affidavit raised various defences (including the defence that the transaction was harsh and unconscionable), did not contest the case by his counsel, but settled the matter by a consent judgment.

That being the position, it is said by Mr. Barrington-Ward that it was not open to me to make the order which I made in this action on January 26, 1925, directing the reopening of that transaction, because that transaction was closed by the judgment of Avory J. Mr. Barrington-Ward says that although the powers of a Court to reopen former transactions between the parties are very wide, they do not extend so far as to enable a Court to reopen a matter which has been concluded, not by agreement between the parties, but by an actual judgment of a Court.

It is necessary to look at the exact words of the section, because the whole matter depends upon them. The section provides that "the Court may reopen the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them." It is contended by Mr. Barrington-Ward that that section cannot possibly have

been intended to give power to reopen a former transaction which had been the subject of a judgment between the parties, because if it had been intended to give power to reopen a previous dealing which had been closed by a judgment, the section would have expressly so provided, and he bases his argument upon the general principle that a judgment can only be set aside by a Court of Appeal, or by some competent higher tribunal, and that except under the slip order it cannot in any way be altered.

I have, with some reluctance, come to the conclusion that Mr. Barrington-Ward's point is a good one. I think that if it had been intended to give the Court power to reopen a former transaction between the parties, notwithstanding that it had been the subject of a judgment, the section must have specifically mentioned a judgment. The words of the section are " notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings." It is not, I think, to the point to say, although it may be quite true, that the judgment in the former action was the result of an agreement. It was the result of an agreement, because the defendant's counsel submitted to judgment. It however was a judgment. In my opinion the matter cannot depend upon whether the judgment in the former action was a judgment after the action had been tried out in Court or was due to the fact that the defendant's counsel submitted to judgment. Sir Walter Schwabe agreed that if there had been a contest in Court followed by the judgment then the matter could not be reopened. In my opinion the matter could not be reopened because having been determined by a judge it was finally determined. I cannot take the view that the matter is any the less finally determined by a judgment because that judgment is the result of an agreement. I think, the point having now been taken, that it is open to me, though at this extremely late stage, to give effect to the point. I therefore hold that the order which I made reopening the whole of these transactions was an order which I had no jurisdiction to make and ought not to have made, and that accordingly I ought now to deal with the matter upon the true basis. It is only

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necessary to add that when I made the order this point was not taken as it might have been. I have no doubt it was not taken because this particular point was not present to the minds of counsel for the defendant. I am of opinion that this point is a good one, and I must, therefore, adopt para. 2 of the certificate of Master Jelf, and the result of that is that the plaintiff will be entitled to judgment for 104*l.*

It only remains that I should deal with two matters. I desire, although it does not actually arise, to say a word with regard to the counterclaim, because it is possible that this case may go further. If I had not felt myself bound by the point now taken to give judgment for the plaintiff I should certainly have allowed the counterclaim. The position under the Act is that if there has been any excess paid or allowed on account by the debtor the Court may order the creditor to repay it. I should certainly have allowed the defendant by way of counterclaim, or in any other way, to recover the money if I had been of opinion upon the true view of the law that any was due to him.

The only other matter with which I have to deal is the question of costs. As I have said, the plaintiff is in my opinion entitled to judgment for 104*l.*, but it is necessary that I should deal with the costs, and the question of costs is not altogether free from difficulty. The position is this: The action was brought for the recovery of money lent, and I held that the transaction was harsh and unconscionable, and I then directed by an order, which I now hold was too wide, that the whole of the transactions between the parties should be reopened. Thereupon an inquiry was held before Master Jelf, and the Master gave a certificate under which the defendant would have been entitled to a very substantial repayment. In these circumstances I have to consider what is right to be done as to the costs. I have come to the conclusion, taking into account all the circumstances, including the fact that I held that the transaction was harsh and unconscionable, and also the fact that this point was not taken when I made my previous order, and that the inquiry before the Master must have been very largely directed to this question, that the

proper order is to enter judgment for the plaintiff with costs up to the date of the Master's order, but without costs as regards the subsequent proceedings.

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Judgment for plaintiff.

Solicitors for plaintiff: *Tredgolds.*

Solicitors for defendant: *Halse, Trustram & Co.*

R. F. S.

THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* SHURE.

1925 *Oct.* 19, 20.

Habeas Corpus—Application for—During Vacation—Practice—Summons for Order Nisi—Applicant committed for Extradition.

A summons taken out during the long vacation with a view to obtaining a writ of habeas corpus to bring the body of the applicant before the High Court should require the parties concerned to show cause, not why the writ should not issue, but why an order nisi for the writ should not issue, inasmuch as the former procedure does not, whereas the latter does, disclose the grounds upon which the application is made.

Bankruptcy—Bankrupt—Extradition Offence—Alleged Removal or Secretion of Part of Estate—Evidence—Burden of Proof—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 10—*Bankruptcy Act*, 1894, *s.* 154, *sub-ss.* 4, 5.

On the hearing of a charge against a bankrupt under the Bankruptcy Act, 1914, s. 154, sub-ss. 4 and 5, proof that the defendant has been in possession of property to the value there specified does not throw upon him the burden of showing that he has not concealed or fraudulently removed any part of it after or within six months before the presentation of the petition; but proof that during that period the defendant has concealed or removed a part of his property to that value throws upon him the burden of showing that in doing so he had no intent to defraud.

SUMMONS for a writ of habeas corpus.

The applicant, Louis Shure, a diamond merchant, having been declared a bankrupt by a Belgian Court, a charge was brought against him in Belgium under the Belgian Commercial Code, art. 577, of having been guilty in Antwerp whilst in partnership with one Sokolowesky, of fraudulent bankruptcy and the removal or secretion of part of his estate, and a

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warrant was issued in Belgium for his arrest on that charge. The applicant being in London, the Belgian Government applied for and obtained in this country a warrant for his arrest with a view to his extradition. On August 7, 1925, the applicant was arrested and brought before the magistrate at Bow Street Police Court, where, after several remands, the magistrate, having considered the depositions and heard the evidence, made an order committing the applicant for extradition to Belgium to take his trial there on the said charge, and the applicant was in the meantime detained in Brixton Prison.

On September 25, 1925, the applicant took out a summons in the High Court calling upon all parties to attend the judge in chambers to show cause why a writ of habeas corpus should not issue directed to the Governor of Brixton Prison to have the body of the applicant before the judge in chambers immediately to undergo and receive all and singular such matters and things as such judge should then and there consider of and concerning him in that behalf.

The applicant made an affidavit in support of the summons, in which he stated that his reason for submitting that he was wrongfully detained was that upon the facts as disclosed by the documents and the depositions sent from Belgium and the evidence before the magistrate at Bow Street there was not made out against him a prima facie case sufficient to connect him with the alleged offence of which he was accused; that the evidence as submitted to the magistrate was not sufficient to justify him in deciding that there was a prima facie case and making the order for extradition which he made; and that upon the facts and the evidence no order for extradition should have been made, but that his release should have been directed.

The summons came before Wright J. as vacation judge, and was by him referred into Court.

H. D. Roome for the applicant.

E. Percival Clarke for the Crown.

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The main issues raised and the statutes and cases cited during the argument appear from the judgment of Avory J. as set out below.

AVORY J. This matter comes before us on a summons taken out during the vacation on behalf of the applicant, Louis Shure, calling upon all parties concerned to show cause why a writ of habeas corpus should not issue to have the body of the applicant before the Court.

At the outset I think it right to say for future guidance that in such a case the better practice is to take out a summons to show cause why an order nisi for a writ of habeas corpus should not issue. The reason is that where the course which was followed in this case is adopted, the grounds on which the writ is applied for do not appear, whereas by the other procedure the order nisi would state these grounds. The inconvenience resulting from the absence of any statement of the grounds of the application has appeared more than once during the present hearing.

As to the merits of the case, the question is whether or not the applicant is lawfully detained in custody. The principle to be applied in dealing with that question in a case of this kind is clearly stated in s. 10 of the Extradition Act, 1870, which provides that in the case of a person accused of an extradition offence, if such evidence is produced as would according to the law of England justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the magistrate shall commit him to prison, but otherwise shall order him to be discharged. The principle expressed in that section has been amplified by the decisions in subsequent cases, particularly in *Reg.* v. *Maurer* (1), where Field J. said: "It seems to me that in *Ex parte Huguet* (2) all the judges intended to decide that it was not for this Court to weigh the evidence, if there was any reasonable evidence of an extradition crime for the magistrate to act upon" (3); and Mathew J. said: "There must be

(1) (1883) 10 Q. B. D. 513. (2) (1873) 29 L. T. 41.
(3) 10 Q. B. D. 515.

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such evidence as according to the law of England would justify the magistrate in committing the prisoner for trial if the alleged crime had been committed in England." (1) That is in effect a repetition of the provision of the section. One other authority may be referred to as showing what the duty of the magistrate is in these cases. In *Reg.* v. *Carden* (2) Lord Cockburn C.J. said: "The duty and province of the magistrate before whom a person is brought, with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if there be any, whether the case is one in which the accused ought to be put upon his trial. It is no part of his province to try the case." The Court has here to say whether there was before the magistrate evidence which, if the alleged offence had been committed in this country, would have justified him in committing the accused for trial. The applicant was charged in Belgium with fraudulent bankruptcy in having removed or secreted a part of his estate. The equivalent offence in English law is that specified in the Bankruptcy Act, 1914, s. 154, sub-ss. 4 and 5, which provide in effect that if a bankrupt after or within six months before the presentation of the bankruptcy petition conceals or fraudulently removes any part of his property to the value of 10*l.* or upwards he shall be guilty of a misdemeanour. In my opinion Mr. Clarke went too far in suggesting that these provisions mean that when once it is proved that the bankrupt has been in possession of property to the value mentioned, the onus lies upon him of showing that he has not concealed or fraudulently removed any part of it during the period specified. In the first instance the onus lies upon the prosecution of showing that the bankrupt has concealed or removed property to that value; and when that has been done the onus is then upon the bankrupt of showing that in concealing or removing the property he had no intention to defraud. Having regard to the evidence which was before the magistrate in the present case, I have come to the conclusion that it would have been prima facie sufficient to justify

(1) 10 Q. B. D. 516. (2) (1879) 5 Q. B. D. 1, 6.

him in committing for trial the person charged if the offence had been perpetrated in England. As the Court is of opinion that the order of the magistrate was right committing the applicant for extradition to take his trial, it is not advisable to make any comments upon the evidence lest they might be used to prejudice the fair hearing of the case. In my opinion the summons should be dismissed.

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SANKEY J. I am of the same opinion.

SALTER J. I agree.

Summons dismissed.

Solicitors for applicant: *S. Myers & Son.*
Solicitor for Crown: *The Director of Public Prosecutions.*

J. R.

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Revenue—Income Tax—Super Tax—Interest-bearing Security—Sale of Security during Interest Period—Accrued Interest—Income or Capital—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., r.* 1 (*f*).

Where a Government or other security, upon which interest is payable at fixed dates, is sold during the currency of an interest period, with interest rights, the increase in the price obtained by the seller by reason of the advance towards the date of the next payment of interest, is not "interest" within the meaning of the Income Tax Act, 1918, Sch. D, but a payment in consideration of an expectation of interest, and the seller is not liable to pay income tax or super tax upon that increase under that Schedule or otherwise.

Brown v. *National Provident Institution* [1921] 2 A. C. 222 held inapplicable.

P. WIGMORE *v.* THOMAS SUMMERSON AND SONS, LIMITED.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the Darlington Ward of the county of Durham.

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On April 7, 1924, the said Commissioners heard the appeal of Thomas Summerson & Sons, Ld. (hereinafter called "the company"), against an assessment under the Income Tax Act, 1918, Sch. D, in respect of untaxed interest for the year ended April 5, 1924.

The following facts were admitted:—

On May 9, 1922, the company purchased 5 per cent. War Stock, 1929–1947, of the nominal value of 25,411*l.* odd, for which the company paid 25,285*l.* odd. The interest on the stock was payable on June 1 and December 1 in each year without deduction of income tax. There was no dispute as to the treatment for income tax of the interest paid on these dates. On April 10, 1923, the company sold the said stock for 25,967*l.* odd. The sale was with interest rights, the stock not being dealt in ex interest until May 1, 1923, May 1 and November 1 in each year being the dates on which the stock was marked ex interest. The company received on the sale a profit of 681*l.* odd. Of this profit the sum of 229*l.* odd was admitted to be a capital accretion. The balance of 452*l.* was brought into charge to income tax against the company in the assessment complained of as untaxed interest. That figure had been arrived at by calculating interest payable on the stock from December 1, 1922, the date of the last payment of dividend, to April 10, 1923, the date of sale of the stock, being 130 days.

For the company it was contended that the whole of the difference between the purchase and sale prices of the stock —namely, 681*l.* odd—was capital accretion, or alternatively, if it was not, it was impossible to say what proportion thereof the purchaser paid for capitalizing the accruing interest; that if that proportion were known the purchaser would pay only for the net value of the dividend accruing, i.e., the dividend after deduction of tax; and that the tax would be collected from the purchaser on payment of the six months' dividend on June 1 next following.

The inspector of taxes (Wigmore) contended that if a security of the kind in question was sold between two dates of payment of interest, the interest must be deemed to have

been received by the vendor to date of sale, inasmuch as the purchase money included an amount of interest accrued that could be definitely ascertained, or in other words that the vendor had realized the interest and so had received it; that as the interest had been accruing without deduction of tax, the sum accrued must be regarded as having been received by the vendors in full; and that the company were therefore liable under Sch. D, Case III., r. 1 (*f*), or, alternatively, under clauses (*a*), (*b*), or (*c*) of that rule. (1)

(1) Income Tax Act, 1918.

Schedule D.

1. Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing—

(i.) To any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; . . . .

(*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C, or E, and not specially exempted from tax;

in each case for every twenty shillings of the annual amount of the profits or gains.

2. Tax under this Schedule shall be charged under the following cases respectively; that is to say,—

. . . . .

Case III.—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case;

. . . . .

Rules applicable to Case III.

1. The tax shall extend to—

(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods;

(*b*) all discounts;

(*c*) profits on securities bearing interest payable out of the public revenue other than such as are charged under Schedule C;

. . . . .

(*f*) interest on any Exchequer bonds issued under the authority of the Treasury during the continuance of the present war and a period of six months thereafter and on any securities issued under the War Loan Acts, 1914 to 1917, or any Act amending those Acts, in cases where such interest is paid without deduction of tax.

. . . . .

Miscellaneous Rules applicable to Schedule D.

1. Tax under this Schedule shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged.

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The Commissioners on the facts considered that the company were not chargeable and that the assessment should be discharged.

The question for the Court was whether on the above facts the company were liable for income tax on the said sum of 452*l.*

Sir D. Hogg A.-G. and *R. P. Hills*, for the Crown, the appellant. The respondents are liable for income tax on the amount by which the war stock in question increased in value by reason of the interest which accrued upon it between December 1, 1922, the date on which the last dividend was paid before they sold the stock, and April 10, 1923, the date on which they sold it. That amount of increase in the value of the stock was "interest" on a security issued under the War Loan Acts on which interest is paid without deduction of tax within the meaning of the Income Tax Act, 1918, Sch. D, Case III., r. 1 (*f*). Alternatively, it was "interest of money" within cl. (*a*) of that rule; or a "discount" within cl. (*b*): see *Brown* v. *National Provident Institution* (1); or a profit on a security bearing interest payable out of the public revenue within cl. (*c*). The increase in the value of a security on account of the accrual of interest has always been regarded as income and not as capital. Thus Courts of equity have recognized that on a sale of stock during the dividend period the amount realized by the sale is compounded partly of the value of the stock itself and partly of the value of the proportionate part of the dividend accrued since the last dividend day, and it is only because of the inconvenience and complexity of the investigation that they have not required trustees of a settlement to pay over the part consisting of dividend to the tenant for life: *Scholefield* v. *Redfern* (2) and *Freman* v. *Whitbread*. (3) The former enactment, the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 97, provided that a person purchasing any public security with current interest should be entitled to deduct from the interest

(1) [1921] 2 A. C. 222. (2) (1863) 2 Dr. & Sm. 173, 183.
(3) (1865) L. R. 1 Eq. 266.

the proportion of the duty which would become chargeable thereon; and although that provision differs from the corresponding provision in the present Act, it goes to show that in the view of the Legislature the seller was entitled to the accrued interest. The respondents are liable to tax on the accrued interest notwithstanding that they sold the stock, inasmuch as the Legislature does not require that there should be an existing source of income in the year of assessment: per Rowlatt J. in *National Provident Institution* v. *Brown*. (1) The value of the security at any time during the interest period may no doubt be affected by the state of the money market, but it also depends upon the accrued interest: see *Brown* v. *National Provident Institution*. (2) The increase in the price of the stock by reason of the accrued interest is a realization by the respondent of a proportion of the interest. The increase in the price which he received represents the accrued interest. It is not contended that the principle of apportionment now in question applies where the periodical income from the security is taxed by deduction; or, even where the tax is not deducted, that the income must be treated as accruing de die in diem. Further, the principle would seem to be inapplicable where the change in the ownership of the security was effected not by sale, but by gift or succession.

A. Bremner for the respondents. The respondents are not liable to income tax in respect of the alleged increase in the value of the stock sold by reason of the accrual of interest. The proposition put forward on behalf of the Crown is that in every case in which a Government or other security is sold at any time during the currency of the interest period the seller receives as part of the price "interest" within the meaning of the Income Tax Act, 1918, Sch. D, Case III., r. 1 (*f*), up to the date of sale, and is therefore subject in respect of it to income tax, and in the following year to super tax. The proposition would apply whether tax was deducted

(1) [1919] 2 K. B. 497; on appeal [1920] 3 K. B. 35; S. C. nom. *Brown* v. *National Provident Institution* [1921] 2 A. C. 222.

(2) [1921] 2 A. C. 222.

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on payment of the periodical interest or not, and the revenue authorities would be entitled to claim tax both from the seller of the stock and the person who owned it when the interest was paid. That proposition is not well founded. The true principle is that when an owner of war stock or other security issued by the Treasury sells it, he sells the security itself, which is capital, and any accretion to the value of the security is also capital. Assuming that during the interest period an increase takes place in the value of the stock owing to the approach of the next payment of interest, that increase is not interest on the stock, but is an enhancement of its capital value for which a buyer of the stock pays an increased price. The only interest payable on this stock is the war stock interest which is payable on the appointed half-yearly dates. The Government is not bound or even entitled to pay to any one a proportionate part of the interest at any time between the prescribed dates for payment of interest. If a person who buys the stock during the currency of the interest period continues to hold it until the date when the interest is payable he will receive the whole instalment of interest, but if he does not continue to hold it until that date he will receive no interest. During the currency of the interest period the stock may be sold repeatedly and pass through many hands, but it is only the particular buyer who holds the stock on the date when the interest becomes payable who receives the interest. The dividend is not apportionable either under the Apportionment Act, 1870 (33 & 34 Vict. c. 35), or otherwise: see *Bulkeley* v. *Stephens*. (1) The respondents are not "persons . . . . receiving or entitled to the income" on the stock, or to any part of it, within the meaning of the Miscellaneous Rules applicable to Sch. D, r. 1, and are not liable to tax under that rule. The price paid by the buyer to the respondents can only have represented the capital value of the stock sold, and no part of it can have represented interest, for interest is payable upon a loan, and as between the respondents and the buyers there was no loan. The value of the stock depends not only upon the accrual of interest,

(1) [1896] 2 Ch. 241.

but upon other facts also, such as the state of the money market, and if, notwithstanding the accrual of interest, the seller of the stock should sell at a loss it would not be equitable to require him to pay income tax. It would be impossible for the revenue authorities to discover every person who had held any portion of war stock for however short a time during the currency of the interest period, and to calculate the amount of accrued interest to which he was entitled and the proportion of the tax for which he was liable. The present case is distinguishable from *Brown* v. *National Provident Institution* (1), where the increase in price under consideration was not interest but a profit on a discount.

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Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

On November 6, 1924, the said Commissioners heard the appeal of Sir John Hubert Oakley (hereinafter called "the respondent") against an assessment to super tax for the year ending April 5, 1924.

The assessment was made in the amount returned by the respondent, and there was included in the assessment a sum of 80*l.* in respect of half-year's interest on 2000*l.* 8 per cent. seven-year notes of Malacca Plantations, Ld., and the sole point at issue and for the decision of the Court was whether that 80*l.* paid in the circumstances hereafter mentioned was the respondent's income for super tax purposes for the year in question. The interest on the notes, which were registered in the books of the company, was paid half-yearly on May 31 and November 30. The notes were sold by the respondent under a contract of sale dated November 29, 1922, but the transfer was not executed till December 14, 1922. The books of the company were closed from November 16 to 30, 1922, for the purpose of paying the half-year's interest on the said notes. The interest due on November 30, 1922, being 80*l.* less tax—namely, 60*l.*—had been

(1) [1921] 2 A. C. 222.

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paid in the net sum to the respondent on or about December 1, and therefore, as the notes had been sold with the interest accrued thereon, the amount of this half-year's interest less tax was paid over to the purchaser by the brokers, who deducted the sum in settlement with the respondent.

For the respondent it was contended that the said interest formed no part of his income for purposes of super tax, 1923–24, as he had not paid income tax thereon, having handed to the purchaser the net sum of 60*l.*; that he had received the interest as trustee for the purchaser, to whom it had to be transferred, and was in fact transferred; that he had no option in the matter, which was dealt with under the rules of the Stock Exchange, and that under these rules the interest was never his property; and that therefore the assessment should be reduced by 80*l.*

For the Crown it was contended that the 80*l.* interest was income of the respondent for super tax purposes for the year in question, and accordingly that the assessment rightly included that sum and should be confirmed.

The Commissioners were of opinion that the interest, together with income tax thereon, which amounted to 80*l.*, did not form part of the respondent's income for the purpose of super tax, 1923–24, and they reduced the assessment by that amount.

R. P. Hills (*Sir D. Hogg A.-G.* with him) for the appellants. The respondent is liable to super tax in respect of the interest which had accrued on the notes which he sold up to the date of the sale, the tax being estimated in accordance with the provisions of the Income Tax Act, 1918, s. 5. The ground of his liability is not merely that the interest accrued on the notes de die in diem, but that he realized the accrued interest by selling it, by causing it to appear as a distinct entity in his broker's accounts, and by receiving the money paid for it by the buyer and treating that as income. In *Commissioners of Inland Revenue* v. *Paterson* (1), where the respondent's wife obtained a loan from an insurance company

(1) [1924] Tax Cases, Appeals to the High Court, Leaflet No. 143.

and applied it in the purchase of shares from him, which were deposited with the company as security for the loan, the dividends on the shares to be received by the company and applied in paying an annual sum in reduction of the loan and the balance to the wife, it was held that the dividends belonged entirely to the wife and were applied for her benefit, and that her husband was therefore liable to super tax in respect of them. Similarly, here, if the respondent did not actually receive the accrued interest, he clearly realized it in the increased price of the notes, and it should be treated as having been paid to him. During the period between the sale of the notes by the respondent and the execution of the transfer, the Malacca Company remained the debtors to the respondent, as the registered owner of the notes, for the interest on them, and the company paid that interest over to him as their creditor, and therefore as between the company and the respondent there was clearly a receipt of interest by the latter.

Wallington for the respondent. The respondent is not liable for the super tax claimed. It is claimed in respect of "interest" received by the respondent on the notes, but he did not receive any interest on the notes. The respondent sold the notes to the buyer before the interest on them became due or payable, and he had therefore no right to receive the interest or any part of it, and it could not form any part of his income. At the date of the sale there was no interest as yet in existence, but only a prospect of its coming into existence on a subsequent date if the company was then able to pay it. The increased amount of purchase money which the respondent received from the buyer of the notes in respect of the advance towards the next payment of interest was not interest on the notes or at all. The respondent sold to the buyer a specific subject matter—namely, the notes together with the right to receive the interest upon them when payable. That subject matter comprised no interest but consisted entirely of capital, and there is no ground for the suggested distinction that one part of it only, namely, the notes, was capital, and the

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other part, namely, the right to the interest, was income; and therefore the whole purchase money received by the respondent for that subject matter represented capital. The fact that, owing to the books of the company being closed, the formal transfer of the notes from the respondent to the buyer could not be completed until after the interest on the notes became payable, and that the company therefore sent the interest to the respondent, did not entitle the respondent to the interest as against the buyer, or make it part of his income. As the respondent had sold the notes to the buyer, he became, on receiving the interest, a trustee of it for the buyer, and was bound by the rules of the Stock Exchange to see that it was at once paid to the buyer. On a sale of real estate, as soon as the contract of sale is completed the vendor becomes a trustee for the purchaser of all that the latter has purchased, including the profits, and is bound to hand it over to the purchaser; and on a sale of personal estate the same rule applies. If the respondent had indorsed the interest warrant to a buyer the latter could not have claimed the interest against the buyer of the notes, and if a receiving order had been made against the respondent his trustee in bankruptcy could not have claimed the interest. As soon as the respondent had received the interest it was in fact duly paid to the buyer of the notes. The cases of *Brown* v. *National Provident Institution* (1) and *Commissioners of Inland Revenue* v. *Paterson* (2) have no application to the present case.

R. P. Hills replied.

ROWLATT J. In the first of these two cases the revenue authorities raise the contention that when a security, such as war loan, bearing interest which is not taxed at the source, passes by sale from one person to another during the currency of an interest period, as in fact it almost always must unless it is sold at midnight on a particular date, an apportionment must be taken of the income, the seller being assessed on the

(1) [1921] 2 A. C. 222.
(2) Tax Cases, Appeals to the High Court, Leaflet No. 143.

income accrued up to the date of the sale, and the purchaser on the income accrued between that date and the date when he receives the interest or sells the security, whichever first happens. It is to be observed that in promulgating that principle the revenue authorities are not seeking to achieve any gain to themselves. If they win this case they get no more tax. They are acting apparently on behalf of the purchasers of the security, who decline to be assessed to tax in respect of income which has been accruing on the security in a period anterior to the date of the purchase. The only result will be to put upon the revenue officers and upon the individual subjects who buy and sell war loan and similar securities more trouble and inconvenience than they would otherwise incur.

In advancing this proposition, Mr. Hills limited it in very important ways. In the first place he said that he did not contend for the application of the principle to cases where the income was taxed by deduction, but conceded that when the interest is paid less tax there is no room for any apportionment. It would be curious if the same class of taxable subject matter should be subject to one rule where the income tax was not chargeable by deduction, and to a different rule where the income tax was so chargeable, but it would be even more curious if this same security, namely, war loan, was subject to one principle where it was taken in the form of bonds in respect of which the tax is deducted from the income, and to another principle where it was taken in the form of inscribed or registered stock so that it fell within the exception introduced into the Act of 1918. That is one limitation on the proposition put forward which is necessarily conceded. Another limitation conceded by Mr. Hills on behalf of the Crown is that, even where the tax is not deducted, the income cannot be treated as accruing de die in diem and apportionable in the case of a person who holds the security continuously from year to year, so as to make the tax payable upon the interest accrued up to April 5 for one year, and the tax period begin again on April 6 of the next year. In a case of that kind as between year and year

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it is admitted that the principle cannot be applied. Again, Mr. Hills says that he does not seek to apply the principle where the change in the ownership of the stock is not in consequence of a sale. If therefore the security passes, as it very well may, by gift, or by succession, or if it falls into a man's liability for tax by his marriage with a woman who owns it, there is in none of these cases any apportionment of tax attaching to the income in the hands of the possessor at the moment when the tax is paid. If the principle was approved that the income accrued from day to day and that the tax attached in that way, it would apply in the cases of the transmission of ownership by gift or succession just as much as in the case of the transmission of ownership by sale. In view of these admitted exceptions it seems obvious that the whole idea of accrual of interest de die in diem is virtually abandoned.

It is necessary to face and realize what, as has been fairly conceded, the consequences of the principle contended for must be. It must be appreciated that the point turns upon this, that because the security is sold and converted into money, the amount of interest up to the date when that money is received, is taken to have been encashed as interest to the seller so as to attract tax upon it. Stock of this kind, however, is not sold like real estate with an apportionment of the incomings. Real estate is sold for a price for the property, and there is a separate apportionment of the rents receivable which is subject to income tax as between the parties. This stock is not sold like that. It is sold en bloc for a sum for principal and accrued and accruing interest, and it is not true to say that in the purchase price there is in fact necessarily to be found a sum exactly equivalent to the amount of interest which has accrued. The interest might be uncertain. In the case of war loan it is not in fact uncertain that the interest will be paid, but on the other hand it is quite certain that it is not going to be paid yet. It may be that a sale of war loan is made, say three months after the last interest has been paid and three months before the next is payable. If the amount of the stock sold is considerable, the interest is

considerable: if say 400,000*l.* worth of war loan is sold the interest on that is 20,000*l.* a year and 10,000*l.* a half year, and three months from the last interest payment 5000*l.* has accrued, but it is not to be paid for another three months. To my mind it is absurd to say that the buyer of the stock is paying 5000*l.* in March for a sum of 5000*l.* which is not to be paid till the following June. He is not paying for that sum. There would have to be in any case a valuation of the amount of the accrued interest. The truth is that the seller does not receive "interest" from the buyer, and it is interest which is the subject matter of the taxation. He receives the price of the expectancy of interest, and that is not the subject matter of the taxation. The whole contention on behalf of the Crown depends upon the fallacy that the price of the expectation of interest is interest. In truth one cannot put the case without relying upon the theory that the interest accrues de die in diem. If that could be said, the contention would be at any rate correct in point of figures and economics, but it cannot properly be said. Mr. Hills admits that he cannot say that, and when he makes that admission he gives up his whole case, because he cannot get out of the price paid a sum which answers to the description of the thing mentioned in the statute—namely, "interest."

It only remains for me to refer to *Brown* v. *National Provident Institution*. (1) I do not think it has anything to do with this case. There the question was as to profits on discounts, and it turned entirely upon how long the discount was held. That does not seem to me to have anything to do with the case of the taxation of interest.

I must therefore decide in the first of the two cases now before me that the appeal be dismissed with costs.

In the second of these cases, *Commissioners of Inland Revenue* v. *Sir J. H. Oakley*, which relates to super tax, I find that the contention of the revenue authorities is still more astonishing, because this appeal is taken with reference to a security the interest on which suffers tax by deduction, and therefore the income tax would not be apportionable

(1) [1921] 2 A. C. 222.

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even as contended for in the last case. It is said that when the investment is sold, the seller must, for super tax purposes, be charged with accrued interest. There is no foundation for that contention, and it is impossible to work that mode of charging this tax in conjunction with the way in which income tax works, because super tax follows income tax. I cannot see any possible answer to this objection. A man buys a quantity of this stock in the middle of the interest period. This being a tax-deducted security, he has admittedly to pay income tax on the whole of the interest when that comes in, and when he comes to pay super tax he must pay it with reference to the income tax which he has already suffered. That seems quite clear, and I do not see any way out of it. Here the respondent has not paid income tax upon the interest which he has received, subject to an observation I shall make in a moment, and therefore he cannot be charged with super tax.

The only other point is this: It happens that this transaction of sale took place on the very eve of the payment of interest, when the interest, except for one day, had all accrued, when the books of the company were closed, and when, as a matter of routine, because the books were closed, the interest warrant had to be handed to the seller and he had to hand it over to the purchaser under the rules of the Stock Exchange. Of course if the seller has received that interest he has to bear the income tax upon it and the super tax, but I cannot for a moment regard the fact that the security was sold on such a day that the transaction could not be physically carried out until later, so far as the transfer of the accrued interest was concerned, as making any difference in the circumstances. That the warrant was made out to the seller, and that he was bound by the practice to hand it on to his buyer, does not to my mind differentiate the case in the very least from the case where he sold the notes in the middle of the interest period, handed over the principal then and had it transferred in the books, so that the dividend warrant could be made out direct to the purchaser who was entitled to it. On November 29, although it was the day

before November 30, he sold the principal and accrued interest, and the purchaser got it all, and it is upon him that the liability must fall for interest and for super tax.

Of course the result is curious, as many results in super tax are. The result is that nobody on the super tax level, who has not more money than appreciation of income tax law, will ever buy a security that is full of dividend, because in doing so he is buying super tax; and that a man on the super tax level, if he wants to sell a security, had better sell when it is full of dividend, because then he is selling super tax. Those are accidents which do not seem to me possibly to affect the administration of the Acts, and I cannot conceive how the Acts could be administered, except at great cost and inconvenience not only to the revenue but to private people who now are not concerned with these minutiæ, if the contention which the Crown put forward here, not in their own interest but in the interest of purchasers, was to succeed.

Therefore, both these appeals will be dismissed with costs.

Appeals dismissed.

Solicitor for Crown in both cases: *The Solicitor of Inland Revenue.*

Solicitors for respondents in the first case: *Howe & Rake, for Lucas, Hutchinson & Meek, Darlington.*

Solicitors for respondent in the second case: *Crawley, Arnold & Co.*

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Oct. 23, 26; *Nov.* 20.

[IN THE COURT OF APPEAL.]

HUYTON AND ROBY GAS COMPANY *v.* LIVERPOOL CORPORATION.

[1924. H. 4464.]

Limitation of Action—Municipal Waterworks—Default of Undertakers in Execution of statutory Duty—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.

The defendants, a municipal corporation, as the waterworks undertakers for their borough and acting under powers conferred by a special Act which incorporated the provisions of the Waterworks Clauses Act, 1847, relating to the breaking up of streets, laid a water main in certain roads in which there were already gas pipes belonging to the plaintiffs. They completed the work in September, 1923. By s. 32 of the Waterworks Clauses Act, 1847: "When the undertakers open or break up the road or pavement of any street . . . . they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground and reinstate and make good the road or pavement . . . . so opened or broken up." The defendants, when filling in the ground after laying their main, neglected to ram the earth sufficiently, whereby the plaintiffs' gas pipes were deprived of the support to which they were entitled, and, owing to a subsidence of the soil, sustained a series of fractures in the months of June and December, 1923, and July and September, 1924. In December, 1924, the plaintiffs commenced an action for the damage suffered in consequence of the fractures. The defendants relied on the Public Authorities Protection Act, 1893, contending that the action had not been commenced within the six months thereby limited:—

Held: (1.) That there was a continuing duty upon the defendants under s. 32 of the Act of 1847 to remedy the neglect in the improper filling in of the ground, and that time did not begin to run under the Act of 1893 so long as that duty remained undischarged;

(2.) That the plaintiffs were entitled to recover compensation for all the damage sustained by them, including that resulting from the fractures which occurred more than six months before action brought.

Judgment of Finlay J. affirmed.

Appeal from judgment of Finlay J.

The plaintiffs were a company incorporated for the purpose of supplying gas to the inhabitants of the parish of Huyton in the county of Lancaster. The defendants, the Liverpool Corporation, were the undertakers of the waterworks of that city under a special Act, the Liverpool Corporation Act, 1921, which incorporated the provisions of the

Waterworks Clauses Act, 1847, with respect to the breaking up of streets. The plaintiffs were possessed of gas pipes which they had laid down in, among other roads of the district, Roby Road and Archway Road, the pipes in the former road having been laid before 1878 and those in the latter in 1880. In March, 1923, the defendants commenced to lay a water main under both the above-mentioned roads, and completed the work in September of that year. In the execution of this work they were, as the judge found, guilty of negligence in two respects: they used no adequate means to support the plaintiffs' pipes during the process of laying the main, and they failed to ram in the earth sufficiently when filling in the trench after the main had been laid. As the result of that negligence a series of fractures took place in the plaintiffs' pipes, whereby the plaintiffs lost a considerable quantity of gas and were put to expense in repairing the broken pipes. The dates on which the several fractures occurred were as follows: (1.) June, 1923; (2.) December, 1923; (3.) About July 9, 1924, when the escape of gas was followed by an explosion; (4.) July 28, 1924, when a further explosion took place; and (5.) September 5, 1924. On December 12, 1924, the plaintiffs commenced their action. The defendants pleaded (inter alia) that the action was not commenced within the time limited by s. 1 (*a*) of the Public Authorities Protection Act, 1893. (1) Finlay J. held that as the defendants had failed to perform the obligation imposed upon them by the Waterworks Clauses Act, 1847, to fill in the ground with due care, there was "a continuance of injury or damage" within the meaning of the above section, and that the action was commenced in time. He accordingly gave

(1) By the Public Authorities Protection Act, 1893, s. 1: "Where . . . . any action, prosecution, or other proceeding is commenced . . . . against any person for any act done in pursuance or execution . . . . of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority . . . . (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

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judgment for the plaintiffs for the whole amount claimed, including the damage caused by the fractures in June and December, 1923.

The defendants appealed.

Greaves-Lord K.C. and *Wooll* for the appellants. The Corporation are entitled to the protection of the statute. The judge was wrong in holding that there was "a continuance of injury or damage" within six months of action brought. In *Carey* v. *Bermondsey Borough Council* (1) Lord Halsbury said that those words must be understood as meaning "a continuance of the act which caused the damage." Though he only speaks of "the act," as he was obviously referring to the words of the immediately preceding line of the section, "the act, neglect, or default complained of," he must presumably have meant by the word "act" to include omissions. And in *Boynton* v. *Ancholme Drainage Commissioners* (2) Scrutton L.J. expressly adopted that reading of the section. He said: "Where what is complained of is a continuing neglect to do something which may cause damage until the neglect is remedied, I think time does not begin to run till the neglect ceases." But whether the cause of the damage be a positive act or an omission, it is that cause and not the damage that has to continue in order to satisfy the section. It is not enough that the damage has continued to within six months before action if the injurious cause has ceased before that period. Thus in *Carey* v. *Bermondsey Borough Council* (1), where the action, which was for personal injuries caused by the defendant's misfeasance, was not begun till more than six months after the misfeasance committed, it was held to be barred, notwithstanding that the plaintiff at the time of action was still suffering from the injuries inflicted. In all the cases in which the defendants have been held not to be protected the injurious act or breach of duty complained of was continuing within the six months. In *Boynton* v. *Ancholme Drainage Commissioners* (2) the defendants were

(1) (1903) 67 J. P. 111, 447. (2) [1921] 2 K. B. 213, 234.

empowered by statute to make the necessary drains for draining their district and were also required to keep those drains when made in proper repair. In 1916 they constructed a drain, but neglected to keep it properly cleaned out, whereby the plaintiff's land was constantly flooded. It was held that the Act of 1893 afforded no defence to an action for the damage, as the breach of the statutory obligation to repair continued down to the time of action brought. Similarly in *Earl of Harrington* v. *Derby Corporation* (1) the discharge of the sewage which caused the pollution complained of continued down to action. In *Whitehouse* v. *Fellowes* (2) road trustees made catch pits for carrying off the surface drainage, but constructed them improperly and also failed to keep them cleaned out, whereby surface water flowed on to the plaintiff's land and did damage. The defendants claimed that the action was barred by the General Turnpike Act, which required it to be brought within three months "after the fact committed." But it was held that notwithstanding that the construction was more than three months before action, as the catch pits were continued in an improper condition causing fresh damage within the three months, the action was brought in time. In *Rex* v. *Marshland, Smeeth, and Fen District Commissioners* (3) a neglect by the defendants of their statutory duty to drain their district, whereby the plaintiff's land was periodically flooded at certain seasons of the year, was held to be a "continuance of injury or damage" within the Act of 1893, and as that neglect continued till within the six months, the statute afforded no defence.

If then there had been a continuing duty here on the Corporation as the waterworks undertakers to remedy their wrongful act of insufficiently ramming the earth after laying their pipe, and if they had legally the power so to remedy it, it may be that the action would have been commenced in time. But there can be no continuance of a breach of duty at a time when the power to remedy the misfeasance has ceased. And here the Corporation had no such power. To

(1) [1905] 1 Ch. 205. (2) (1861) 10 C. B. (N. S.) 765.
(3) [1920] 1 K. B. 155.

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remedy their neglectful act would have required an opening of the road. But it is an indictable offence to open the ground of a highway except under statutory powers in that behalf. Indeed that the person so offending had got the consent of the road authority to his breaking open the roadway will be no defence : *Hawkins* v. *Robinson*. (1) Nothing short of the authority of Parliament will suffice, and the defendants here had not that authority. Their only power to break open the soil of a highway was under s. 28 of the Waterworks Clauses Act, 1847, and the only purposes for which such a power is given to the undertakers by that section are those of laying down the water pipes and other works and engines and from time to time repairing, altering, or removing them. (2) When the undertakers have laid their pipes they are under s. 32 required promptly to fill in the ground and reinstate the surface, and when once that has been done they have no power to open the ground again for any purpose other than those specified in s. 28. They cannot do so for the purpose of better ramming the earth if it turns out to have been

(1) (1872) 37 J. P. 662.

(2) By s. 28 of the Water Works Clauses Act, 1847: "The undertakers . . . . may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter or remove the same, and for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage that may be done in the execution of such powers."

By s. 32: "When the undertakers open or break up the road or pavement of any street or bridge, or any sewer, drain, or tunnel, they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and reinstate and make good the road or pavement, or the sewer, drain, or tunnel, so opened or broken up . . . . and shall after replacing and making good the road or pavement which shall have been so broken up, keep the same in good repair for three months thereafter, and such further time, if any, not being more than twelve months on the whole, as the soil so broken up shall continue to subside."

insufficiently rammed when the ground was first filled in. The concluding words of that section, imposing an obligation to keep the road or pavement in good repair for twelve months if it continues to subside, only apply to the surface. That obligation is intended for the protection of passengers using the street, and not of companies or local authorities whose gas mains or sewers are situate some feet beneath the surface. According to the judgment appealed from the defendants would be under a continual obligation to commit an indictable offence in order to get rid of their liability.

Singleton K.C. and *Lynskey* for the respondents. The defendants' breach of duty continued down to the time of action. Sect. 32 of the Act of 1847 imposes on the undertakers who have opened the road a duty to "fill in the ground and reinstate and make good the road." That means that they must not only do that work, but do it properly. Under that section "It is the duty of the water company to reinstate and to leave its reinstatement in such a condition that no further reinstatement will be required": per Phillimore J., *Hartley* v. *Rochdale Corporation.* (1) If, as here, they have not done it properly, they have not discharged their duty, and are still bound to discharge it, and, being so bound, they are impliedly authorized and required to do all that is necessary to its discharge, including the reopening of the ground if it has been already filled in and covered up. They cannot by merely covering up bad work deprive themselves of the power to remedy the defect, and thereby escape the consequences of their default.

Greaves-Lord K.C. in reply.

Cur. adv. vult.

Nov. 20. The following written judgments were delivered:

BANKES L.J. This is an appeal by the defendants from a judgment of Finlay J. deciding that the plaintiffs' action was not barred by the Public Authorities Protection Act, 1893. The plaintiffs' claim was for damages for injury to some of their gas pipes due, as they alleged, to the negligence

(1) [1908] 2 K. B. 594, 599.

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of contractors employed by the defendants to lay water pipes in close proximity to the existing gas pipes of the plaintiffs. The learned judge found that the plaintiffs' complaint was justified, and that the injury to their pipes had arisen in consequence of the default on the part of the contractors in not sufficiently supporting such of the gas pipes as required artificial support, and in not properly filling in the trenches they had made and consolidating the soil under or around the gas pipes which had been exposed in the course of making the trenches for the water pipes. The action was not commenced until the month of December, 1924. The contractors had completed their work by September, 1923. It was under these circumstances that the defendants relied on the provisions of the Public Authorities Protection Act, 1893. It is not, in my opinion, open to this Court to attempt to put its own construction upon the language of s. 1 of that Act. The case of *Carey* v. *Bermondsey Borough Council* (1) is binding upon this Court, and it must accept the construction put upon the statute in that case. In the present case what is complained of is the neglect and default of the contractors employed by the defendants, which occurred not later than September, 1923. As a direct result of that neglect or default, the plaintiffs' pipes were cracked and injured, and some of the cracking and injury certainly occurred within six months of this action being commenced. An act of omission may constitute a breach of duty just as an act of commission can. In the recent case of *Boynton* v. *Ancholme Drainage Commissioners* (2) this Court held that it was the continuing neglect of the defendants which prevented the statute running. From some points of view and in some cases it is easier to establish a continuing neglect or default in the case of an act of omission than in the case of an act of commission, because once it is established that the act of omission constitutes a breach of duty the breach continues under most circumstances until the omission is remedied. This is, of course, not true where it can be established that the duty

(1) 67 J. P. 447 ; 20 Times L. R. 2. (2) [1921] 2 K. B. 213.

to remedy the omission ceased before the injury complained of occurred, or on the present construction of the statute if it ceased more than six months before the commencement of an action complaining of the omission. In the present case, but for the argument founded on the provisions of the Waterworks Clauses Act, it would seem plain that the omission to give, or to restore, as the case may be, the necessary support to the gas pipes was a continuing breach of duty certainly down to the time when the fractures to the gas pipes occurred and the omissions were made good. It was said, however, that the effect of the Waterworks Clauses Act was to absolve the defendants from any responsibility for the condition of the road, and the excavations which had been made, after a certain period, and that as from that date the defendants' duty in regard to the plaintiffs' pipes ceased, and that there could therefore be no continuing breach of duty. I do not think that this argument, which is founded on the provisions of ss. 28 to 34 of the Waterworks Clauses Act, 1847, with respect to the breaking up of streets, can be supported. It is, no doubt, correct to say that the defendants were not entitled of their own motion and without applying for the necessary permission at the time when the fractures occurred to break up the streets for the purpose of making good the omissions of their contractors. That is, however, a very different thing from saying that those omissions were in consequence wiped out as breaches of duty. In my opinion they continued as breaches of duty in spite of the difficulty (if any) there might be in making them good. For these reasons I consider that the plaintiffs established the necessary continuing breaches of duty with the resulting damage down to a time within six months before the commencement of the action, and that the action consequently was maintainable. The appeal therefore fails, and must be dismissed with costs.

For the purpose of this judgment it was not necessary to consider the authorities which were cited to us. Some day it may be necessary to consider whether the case of *Hague* v. *Doncaster Rural Council* (1) was correctly decided, and whether

(1) (1908) 73 J. P. 69.

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the summary of the decisions by McCardie J. in *Rex* v. *Marshland, &c., Commissioners* (1) is accurate. It is necessary, however, in reference to the judgment of Buckley J., as he then was, in *Earl of Harrington* v. *Derby Corporation* (2), to say that I do not think he had in mind a case like the present when he refers to "damage inflicted once and for all which continues unrepaired."

SCRUTTON L.J. This appeal raises a question as to the applicability of the Public Authorities Protection Act to the following circumstances.

The Liverpool Corporation, acting under statutory authority, broke up certain roads for the purpose of laying water mains. In those roads were gas pipes of the Huyton Company, lawfully placed therein. The Corporation removed the soil supporting these pipes, and so negligently replaced it that in consequence of subsidence caused by the negligence certain fractures were caused in the gas pipes. The work of the Corporation was carried out between March and September, 1923. Most of the fractures complained of were in July–September, 1924. The gas company issued their writ on December 12, 1924. Were the Liverpool Corporation protected by the Public Authorities Protection Act, which provides: "1 (*a*): The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof"? The Act in question was substituted for a large number of statutes containing varying limitations of the time within which legal proceedings must be started, many of which statutes made the time date from the arising of the cause of action. This language has been abandoned, and time is made to run from the "act, neglect or default complained of." What is the effect where the cause of action is damage following from an act or neglect, and the act is before the six months' period but the damage within it? Where there is one act which causes damage which gradually

(1) [1920] 1 K. B. 173. (2) [1905] 1 Ch. 227.

develops, as in a claim for personal injury, we are bound by the decision of the Court of Appeal in *Carey* v. *Bermondsey* (1) to hold that time runs from the act, and not from the latest damage. It is not necessary to decide in the present case what is the result where no damage occurs till six months has elapsed from the act, and damage is a necessary part of the cause of action. If time runs from the act this leads to the startling result that you may lose a cause of an action before you have got it. Possibly this remarkable result might be avoided by holding that the words "neglect complained of," "default complained of," involve something which can be legally complained of, and therefore the time runs from the accruing of the cause of action, though not from the latest development of the damage; but it is not necessary so to decide in the present case. But the case seems to me quite different where after the original act there is a legal duty to avert its consequences, neglect of which is a continuing breach from day to day. Where a man removes a support, which he ought to render continuously, and does not replace it, there is a continuing breach of duty, and on the day of the damage complained of there is a neglect and damage resulting therefrom, and it seems to me immaterial that the original removal was some time before. This helps one to appreciate the meaning of the concluding words of the section, "or in case of a continuance of injury or damage, within six months of the ceasing thereof." *Carey's* case (1) says this means a continuance of the act or default. If the act or default continued the time would run from it, so long as it continued, under the first part of the section, and it appears to me that the additional words are meant to prevent the necessity of separating in a continuous act or neglect the damage resulting from that part of the continuity which was more than six months before the writ from the damage resulting from that part of the continuity which was within six months of the writ, and to enable the whole damage resulting from the whole continuous act or neglect to be recovered if the action was brought within six months of the

(1) 67 J. P. 447.

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cessation of the continuing damage. If this is so, in the present case there was a withdrawal of the support to which the gas pipes were entitled, a duty under s. 32 of the Waterworks Clauses Act to make good the road which had been broken up, and a continuous neglect of that duty from the time of the original act to the time of the writ, whereby damage occurred. As the Corporation had never made the road good but left the excavation in it so negligently filled up that the soil in it was continually subsiding, the year of maintenance provided by s. 32 had not begun to run.

For these reasons I think Finlay J. was right in rejecting the defence of the Liverpool Corporation. Within six months of the writ there was continuing neglect of their duty to make good the excavation which had withdrawn the support of the gas pipes, and damage resulting therefrom. This enables all the damage to be sued for. The case appears to me, as Finlay J. thought, to be on all fours with the *Ancholme* case. (1) The appeal must be dismissed with costs.

ATKIN L.J. The Public Authorities Protection Act has in the past caused difficulties, and probably will continue so to do. It appears to me difficult to read s. 1 as though the commencement of the limitation period of six months was the accrual of the cause of action. It looks as though the Legislature in using in the statute, which is in the nature of a consolidating and amending statute, the words "act, neglect, or default complained of" intended to discard the words found in some of the repealed Acts, "cause of action," and intended the period to run from the occurrence of the "act, neglect, or default" for or in respect of which any action is commenced. If an act is done which subsequently causes damage it appears to me that the "act complained of" in an action is the act, not the damage; and that the damage is the legal justification for complaining of the act. This form of words leads to the possibility that a person may lose his right of action before ever he has acquired it, as where damage is the gist of the action and only occurs more than six months

(1) [1921] 2 K. B. 213.

from the date of the act complained of. Apart from authority I should have thought that this absurd result is, if not entirely removed, at least much mitigated by the alternative provided at the end of the section, "in the case of continuance of injury or damage within six months next after the ceasing thereof." I find it difficult to suppose that "injury" and "damage" are intended to mean the same thing, though in general usage they are both capable of expressing detrimental consequences. I find it still more difficult to suppose that the word "damage" means not the harmful effect of the act complained of but the act itself, or series of acts.

It seems desirable to recapitulate shortly the relevant variations of facts to which the words of the statute may apply. In the word "act" I include, where appropriate, "omission." (1.) An act may be actionable in itself and occur once and cause immediate damage once for all: as, for instance, trespass to the person or to property. Such damage may be of very short duration; or it may continue, as, for instance, a permanent maiming, or a shock to the foundations of a house which in the course of time causes the structure to crack and be unsafe. (2.) An act may be actionable in itself and be continuous, thereby causing continuous damage; as, for instance, a continuous trespass either by imprisonment of the person or trespass to land. (3.) An act may only be actionable if it causes damage, and may occur once and cause immediate damage once for all; as in the case of negligent driving, causing damage to person or goods. Such damage as in case (1.) may be of short duration or may be continuous. (4.) An act may only be actionable if it causes damage, and may be continuous and cause continuous damage, as in the case of obstruction of light and other forms of nuisance; or may cause damage occurring once for all, as in the case of the breach of a continuous duty to take care, causing damage once for all. (5.) Acts whether actionable with or without damage may occur only once and cause damage at a later date, and such damage may occur once or on two or more independent occasions. Special damage caused by a libel may illustrate the case of an act

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actionable in itself. Illustrations of the other class are cases of negligent breach of duty in the construction of vehicles, or dangerous chattels, intended to be used by the person injured. So are cases where an excavation is made once for all, and a subsidence or a series of subsidences follows at various times, each causing damage. It is probable that the framers of the Act had not all these possible combinations under consideration; and I agree with the expression of opinion of Scrutton L.J. in *Tuckwood* v. *Rotherham Corporation* (1), where he says that considerable difficulty arises from the fact "that the Act of 1893 is framed in general terms and has to be applied to a large number of cases which were obviously not present to the mind of the Legislature." Nevertheless we have to consider how the Act can be applied in these varying conditions. Without the light of existing authorities I think much could be said for the view that the words "continuance of injury or damage" were appropriate —"injury" to the continuance of the act or the continuance of the operation of the act causing damage, not confining injury to acts actionable in themselves, and "damage" to the continuance of the harmful consequence of the act. One could surmise that while there might be good reason for imposing a limit of six months where damage was suffered and was over, it might well be thought that it was unfair to impose such a short period of limitation where damage was continuing, and it became necessary, possibly prematurely, to pre-estimate the damage. But I am precluded from coming to a conclusion as to this by the decision in *Carey* v. *Bermondsey Borough Council* (2), which, as reported, lays down that "'continuance of the injury or damage' means the continuance of the act which caused the damage." This plainly prevents continuance of the damage alone from extending the period of limitation. It does not define what is meant by "continuance of the act complained of." I think the words would clearly cover cases (2.) and (4.) above. Would they cover (5.), where the act is done once for all but continues to operate so as to eventually cause damage later?

(1) [1921] 1 K. B. 526, 534. (2) 67 J. P. 447.

Channell J., whose judgment was under appeal, apparently thought they would, for he refers to cases of subsidence (1), and would probably have in his mind *Darley Main Colliery Co.* v. *Mitchell* (2), where the facts were as suggested above; and I think that Buckley J. was of the same opinion in *Earl of Harrington* v. *Derby Corporation* (3), but I am not sure, for he refers to "new damage recurring day by day in respect of an act done, it may be, once and for all at some prior time." If one had to decide the question and came to the conclusion that the continued operation of an act done once for all was a continuance of injury or damage, this present case could easily be decided, for the damage suffered by the plaintiffs was clearly due to the continued operation of the original neglect or default of the defendants in laying their water pipe. But it becomes unnecessary to decide this if the defendants were under a continuous duty to see that the earth which formed the support of the plaintiffs' pipes was so replaced as to continue to afford an adequate support. I think that there was such a continuous duty. If so, the case falls within case (4.) as stated above; and there was a continuance of injury or damage sufficient to take the case out of the statute. In my opinion the necessary duty is imposed upon the plaintiffs by s. 32. On the facts that happened it would be too narrow a view of that section to hold that the plaintiffs had made good the road, or had kept it in good repair, as long as the soil broken up had continued to subside. I think therefore that the judgment of Finlay J. was right and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *F. Venn & Co., for Town Clerk, Liverpool.*

Solicitors for respondents: *Finch, Jennings & Tree, for Syers, Dixon & Barrell, Liverpool.*

See next case, *Freeborn* v. *Leeming.*

(1) 67 J. P. 111. (2) (1886) 11 App. Cas. 127.
(3) [1905] 1 Ch. 227.

K. B. D.
1925
June 16, 17.
C. A.
Nov. 5, 20.

[IN THE DIVISIONAL COURT AND IN THE COURT OF APPEAL.]

FREEBORN *v.* LEEMING.

Limitation of Action—Public Authority—Action for Negligence—Personal Injuries—Whether Time runs from negligent Act or from resulting Damage —Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

The plaintiff, being injured in an accident, was taken to a workhouse infirmary and placed under the care of the defendant, the medical officer. The defendant negligently failed to diagnose the nature of the plaintiff's injury and made no attempt to give him the treatment which if given at the time would have effectually cured him. On October 15, 1923, the plaintiff left the infirmary and from that time ceased to be under the defendant's care. He consulted another doctor, who discovered that his hip was dislocated, but as it was then too late to apply the necessary remedy, the plaintiff's injury was permanent. On April 25, 1924, more than six months after he had ceased to be under the defendant's care, he brought his action claiming damages for negligence:—

Held, on the authority of *Carey* v. *Bermondsey Borough Council* (1903) 67 J. P. 447, that the action was barred by s. 1 of the Public Authorities Protection Act, 1893, not having been commenced "within six months next after the act, neglect, or default complained of."

Judgment of Divisional Court affirmed.

APPEAL from the Great Grimsby county court.

The plaintiff was knocked down by a motor car on September 5, 1923, and his left hip joint was dislocated. On September 6 he was taken to the workhouse infirmary and placed under the care of the defendant, a qualified medical man, who was the medical officer of the infirmary. He remained under the defendant's care until October 15, 1923, when he left the infirmary by his own desire. When the plaintiff was admitted to the infirmary the defendant did not make any proper or sufficient examination of him, and did not discover, as he would have discovered if he had treated the plaintiff with reasonable care and skill, that his hip was dislocated, and he therefore made no attempt to reduce the dislocation, a thing which on the evidence might easily have been done at the time. If that had been done the result of the injury to the plaintiff would have been transitory, and he would have returned to light work in a

of Parliament which are quite possibly indistinguishable from the section in question here, in which it has been held that the period is intended to run from the accruing of the cause of action. In *Gillon* v. *Boddington* (1), a case decided on a London Dock Act which provided that no action should be commenced against any person for anything done in pursuance of that Act after six calendar months next after the fact committed, it was held that the time must run from the accrual of the cause of action. Abbott C.J. said: "I am of opinion that the case of *Roberts* v. *Read* (2) is an answer in point of authority to the objection which has been taken upon the Act of Parliament, and I cannot forbear saying, that I have great pleasure in finding such a decision in the books; for it appears to me to be one in which the wisdom of the common law has been interposed to prevent the injustice which might arise from too literal an adherence to the words of an Act of Parliament." I need only say that I am not prepared to deal with the Public Authorities Protection Act, 1893, quite in that way. I do not know whether the words of an Act of Parliament can be too literally followed, but I agree with Bray J. when he said in *Turley* v. *Daw* (3) that he had to consider the plain words of the Act. That was an action for damages caused to the plaintiff by the negligence of the defendant, the high bailiff of a county court, in making a false return to the court of the service on the plaintiff by the defendant or his officers of a judgment summons (which had never been so served) by reason whereof an order was made for the committal of the plaintiff under which he was arrested and imprisoned. The question to be decided was whether the six months time limit prescribed by s. 1 (*a*) of the Act of 1893 ran from the making of the false return by the defendant, or from the date when the plaintiff was arrested under the committal order. Bray J. said: "Now, I have plain words to deal with. The section does not use the words 'cause of action.' It uses, and I think advisedly uses, and intends to use, 'the

(1) Ry. & Moo. 161, 164. (2) 16 East, 215.
(3) 94 L. T. 216, 218.

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act, neglect, or default.' I need not go into the question of when the cause of action arose." In my opinion that decision is right, and I think, therefore, that the county court judge took a wrong view, and that the period of six months does not run from the accrual of the cause of action; nor can I agree with him that no damage accrued from the defendant's negligence until a period of six or eight weeks after the plaintiff had left the infirmary. It was said that if the defendant had not done what he did, but had diagnosed and reduced the dislocation, the plaintiff would have been in the same position as he in fact was for a period of six or eight weeks, that he would have been lying in bed and, therefore, that he received no damage until after some such period had expired. I think that that is a view which it is impossible to take. There is no evidence on which it could be taken. It seems to me obvious on the undisputed facts that the damage to the plaintiff began to result to him from the time when the doctor should have discovered and reduced the dislocation. The result of the negligence was that instead of the plaintiff lying in bed as a convalescent man with the dislocation reduced, he was lying in bed in a very dangerous and unsatisfactory condition with his unreduced dislocation getting worse every hour and becoming more difficult every hour to reduce. For these reasons I think that the county court judge was wrong in acceding to the argument of counsel for the plaintiff that no damage resulted from the negligence of the defendant until a period considerably later than the act of negligence itself. This appeal must, therefore, be allowed and judgment must be entered for the defendant.

SWIFT J. I agree on both grounds. *Appeal allowed.*

F. C.

The plaintiff appealed.

Sir H. Slesser K.C. and *Edgar Dale* for the appellant. The generally accepted rule with respect to statutes of limitation is that time begins to run from the accrual of the cause of action and not before, and to that rule the Public Authorities Protection Act forms no exception, notwithstanding the

brief time, and before long to full work. The consequence of the negligence of the defendant was that he left the infirmary with the dislocation unreduced, and went to his home, where he was placed under the care of other medical men. After a short time the dislocation was discovered. An attempt was made by a surgeon to reduce it, but, owing to the lapse of time, that which would have been easy in the first instance had become impossible. The plaintiff was to some extent a disabled man; his wage-earning power was impaired, and the results of the defendant's negligence were undoubtedly grave. On April 25, 1924—six months and ten days after he had left the infirmary—the plaintiff commenced an action in the High Court against the defendant claiming damages for negligence. The defendant denied negligence and pleaded, among other things, that he was entitled to the protection of the Public Authorities Protection Act, 1893 (1), on the ground that the action had not been commenced "within six months next after the act, neglect, or default complained of." It was admitted that so far as his status and position were concerned he was so entitled. The action was remitted to the Great Grimsby county court. The county court judge found that the defendant had been guilty of negligence during the plaintiff's stay in the infirmary and that that negligence was the cause of the plaintiff's permanent injury, but that the negligence ceased on October 15, on which date the plaintiff passed out of his care. The county court judge, however, held that the statute did not begin to run until a cause of action arose, and that here no cause of action arose until after the commencement of the six months, for the reason that if the

(1) By the Public Authorities Protection Act, 1893, s. 1: "Where .... any action, prosecution, or other proceeding is commenced .... against any person for any act done in pursuance or execution .... of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority .... (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

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defendant had correctly diagnosed the mischief and reduced the dislocation the plaintiff would have been confined to his bed for six or eight weeks after he left the infirmary as the result of the original accident, and that any damage attributable to the defendant's negligence did not begin until after that period had ended. He accordingly held that the action was commenced in time, and gave judgment for the plaintiff for 1800*l.*

The defendant appealed.

Mortimer K.C. and *Farleigh* for the defendant. The defendant was protected by the provisions of s. 1 (*a*) of the Public Authorities Protection Act, 1893. The action was not commenced "within six months next after the act, neglect, or default complained of," and was therefore out of time. The most that could be said was that the alleged neglect continued while the plaintiff was under the defendant's care, that is, until October 15, 1923, but the writ was not issued until April 25, 1924. There was no "continuance of injury or damage" within the meaning of the concluding words of s. 1, sub-s. (*a*): *Carey* v. *Bermondsey Borough Council.* (1) In giving judgment in the Court of Appeal in that case Lord Halsbury said that it was manifest that those words mean "the continuance of the act which caused the damage." In *Rex* v. *Marshland, Smeeth, and Fen District Commissioners* (2) McCardie J. held that there must be a continuing breach of duty together with continuing damage. And in *Boynton* v. *Ancholme Drainage and Navigation Commissioners* (3) the Court of Appeal held that s. 1 of the Act of 1893 afforded no defence to the Commissioners for a breach of their duty to drain their district, inasmuch as in that case the injury and the damage resulting therefrom to the plaintiffs were continuous. In the present case the county court judge was wrong in holding that the time limited by the statute did not begin to run until the cause of action arose. The time limit ran from "the act, neglect, or default": *Turley* v.

(1) 67 J. P. 111, 447. (2) [1920] 1 K. B. 155.
(3) [1921] 2 K. B. 213.

Daw (1), and there could have been no wrongful act by the defendant after October 15, 1923.

[They also referred to *Earl of Harrington* v. *Derby Corporation* (2), *Howell* v. *Young* (3), and Darby and Bosanquet's Statutes of Limitation, 2nd ed., p. 46.]

Edgar Dale for the plaintiff. If the contention on behalf of the defendant were correct, before any right of action accrued to a person, he might be precluded from suing when damage subsequently arose. The true meaning of s. 1 (*a*) is that the time limit runs from the date of the cause of action. The decisions relating to the undermining and subsidence of land support this view: *Roberts* v. *Read* (4); *Gillon* v. *Boddington*. (5) In *Backhouse* v. *Bonomi* (6) the plaintiff's house was injured by mining operations carried on by the defendant under adjoining land, and it was held that the period of limitation began to run from the date when the actual damage to the house occurred. *Darley Main Colliery Co.* v. *Mitchell* (7) was a decision to the same effect. Further, the learned county court judge was wrong in holding that there was no continuance of the injury or damage. Both the injury and the damage continued: *Earl of Harrington* v. *Derby Corporation*. (2)

[He also referred to *Lloyd* v. *Wigney* (8); *Fairbrother* v. *Bury Rural Sanitary Authority* (9); and Chartres' Public Authorities Protection Act, 1893, p. 142.]

SALTER J. I regret to have to come to the conclusion that the appeal must be allowed. [The learned judge stated the facts as above set out and continued:] On those findings counsel for the plaintiff submitted (*a*) that the action was commenced within six months next after the act, neglect, or default complained of; (*b*) that if that were not so, he was entitled to succeed on the words of the latter part of s. 1 (*a*) "or, in case of a continuance of injury or damage,

(1) (1906) 94 L. T. 216.
(2) [1905] 1 Ch. 205.
(3) (1826) 5 B. & C. 259.
(4) (1812) 16 East, 215.
(5) (1824) Ry. & Moo. 161.
(6) (1861) 9 H. L. C. 503.
(7) (1886) 11 App. Cas. 127.
(8) (1830) 6 Bing. 489.
(9) (1889) 37 W. R. 544.

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within six months next after the ceasing thereof"; and (*c*) that the delay in bringing the action had been caused by the fraud of the defendant. The county court judge rejected the contentions (*b*) and (*c*), but accepted (*a*). Counsel for the respondent now contends that the judge was right in accepting (*a*), and alternatively, that he was wrong in rejecting (*b*) and (*c*). With regard to (*c*) there was ample evidence on which the county court judge could refuse to find that the delay was due to fraud on the part of the defendant. With regard to (*b*), the county court judge rejected that contention on the authority of *Carey* v. *Bermondsey Borough Council* (1), where it was held that the word "continuance" referred to a continuing cause of action. That case has always been regarded as deciding this question, and in my opinion the county court judge was right in following it. That leaves only the first contention. It is said, first, that on the true reading of s. 1 (*a*) the period of six months runs from the accrual of the cause of action; secondly, that there is no cause of action for negligence until the damage has been caused; and, thirdly, that the negligence of the defendant caused no damage to the plaintiff until a time within six months from the time of commencing the action. I will accept the second contention, but I cannot accept the first or the third. The words of the Act seem to me to be very plain. It is very easy to imagine cases of hardship and it may well be that by the time a cause of action has accrued, the happening of the damage as a result of the act, it may be too late to sue. But it must be remembered that this Act is obviously intended for the protection of public officers who are defendants. It assumes misconduct, and it is designed to protect public officers even where they have been guilty of misconduct. No doubt it contemplates an "act, neglect, or default" complained of in an action. It seems quite clear that the date from which the period is to run is not the date of the accrual of the cause of action, but the date of the act, neglect, or default complained of.

There have undoubtedly been cases decided on other Acts

(1) 67 J. P. 111, 447.

unusual terms in which s. 1 is expressed. It is true that, as Bray J. said in *Turley* v. *Daw* (1), the section does not use the words "cause of action," but that is immaterial, for "The several statutes of limitation being all in pari materia, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same": per Abbott C.J. in *Murray* v. *East India Co.* (2) In *Turley* v. *Daw* (1), where an action was brought against the high bailiff of a county court for having falsely reported to the court that he had served a judgment summons upon the plaintiff, a judgment debtor, whereby the plaintiff in default of payment of the ordered instalments was committed to prison, it was held that the action was not maintainable upon the ground amongst others that it was not commenced till more than six months after the false return, although within six months after the arrest under the committal order. Bray J. held, indeed, that the statute ran from the false return and not from the arrest. But that was not the principal ground of his decision, which was that so long as the committal order stood unreversed no action could be founded on the false return which led to the order being made. That case, which has never been affirmed by any Court of Appeal, stands alone in conflict with the general current of authority, and ought to be overruled. For if it is to be held correct, it involves the strange conclusion that, in actions in which it is necessary to prove damage, the action may be barred before the cause of action has come into existence. In all cases in which damage is an essential part of the cause of action, as in the subsidence cases: *Darley Main Colliery Co.* v. *Mitchell* (3); *Crumbie* v. *Wallsend Local Board* (4), or slander for words not actionable in themselves: *Saunders* v. *Edwards* (5), time runs not from the act or default, but the resulting damage. *Carey* v. *Bermondsey Borough Council* (6) is not opposed to this contention, for there the personal injuries which

(1) (1906) 94 L. T. 216.
(2) (1821) 5 B. & Al. 204, 215.
(3) 11 App. Cas. 127.
(4) [1891] 1 Q. B. 503.
(5) (1662) 1 Sid. 95.
(6) 67 J. P. 447.

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constituted the damage were inflicted once and for all at the time of the accident, though the unpleasant consequences of that damage continued. The facts of that case brought it within the earlier words of the section, " next after the act, neglect, or default complained of " ; it was not, as here, a " case of a continuance of injury or damage." Then if it is sufficient that in such a case as the present the damage of which the plaintiff complains should have accrued within the six months it did so here. Upon the evidence the plaintiff would in any event, even if the defendant had not been guilty of any neglect, have been laid up for two months in the infirmary as the result of the motor car accident which caused the injury to his hip. It is only the damage which accrued after the expiry of those two months that is attributable to the defendant. But even if the statute is to be taken to run from the " neglect or default " and not from the resulting damage, here the neglect did continue within the six months. If the defendant's failure to discover the fact of dislocation was likely to have dangerous results there was a continuing duty on him to correct that mistake, notwithstanding that the patient had left the infirmary.

Mortimer K.C. and *Farleigh* for the respondent were not called upon.

Cur. adv. vult.

Nov. 20. The following written judgments were delivered.

BANKES L.J. In this case the plaintiff brought an action against a medical man claiming damages for negligent treatment. The facts, so far as it is material to state them, are that the plaintiff was knocked down by a motor car and injured. He was removed to a hospital, where he was attended by the defendant. As found by the county court judge, the defendant was negligent in failing to diagnose what the plaintiff was suffering from. Had he done so the plaintiff would have recovered within a short period of time. As it was, he remained in the hospital for some time, and then, being dissatisfied with the treatment, he left and submitted himself to other medical men, who advised an

operation, which necessarily resulted in the permanent shortening of one leg. The action was not commenced within six months of the plaintiff leaving the hospital and ceasing to be attended by the defendant. The defendant pleaded the Public Authorities Protection Act, 1893. It was admitted for the plaintiff that the Act applied, but it was contended that the action was not, under the circumstances, barred. The material section of the statute, s. 1 (*a*), reads as follows: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof." It is obvious from a perusal of the Schedule containing the enactments repealed, which go back as far as the reign of Queen Elizabeth, that the Legislature intended in the case of actions against public authorities not only to substitute one time limit for all existing time limits, but by adopting a new definition of what constitutes that limit to modify the existing law upon the subject. If it were open to this Court to put its own construction upon the language used it would be necessary to consider very carefully what the construction should be and to discuss the various authorities which have been cited to us. As far as this Court is concerned it must accept the construction put upon the language of the section in *Carey* v. *Bermondsey Borough Council*. (1) That was an action tried before Channell J. The plaintiff had been injured by falling over a projection in the road which had been put there by the negligence of the defendants' servants. The fall and the injury occurred

(1) 67 J. P. 111, 447.

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more than six months before action brought. At the time the action was brought the plaintiff was still suffering from the injury. The defendants pleaded the statute. The contention by the plaintiff's counsel was that the injury or damage to the plaintiff had not ceased when she brought her action, that the words of the section must be given their ordinary meaning, and that if the injuria ceased immediately after the accident the damnum still continued. Channell J., without calling on the counsel for the defendants, decided in their favour, holding in effect that the only case in which the time limit did not apply after the expiration of six months from the date of the neglect or default was where there was a continuing cause of action. This decision was affirmed in the Court of Appeal, consisting of Lord Halsbury and Lord Alverstone. (1) Counsel for the defendants urged that at the time of action brought the plaintiff was still suffering from the consequences of the defendants' negligence, and that so long as she was suffering there was a continuance of the injury or damage. Lord Halsbury dealt with the argument as follows: "In my opinion the judgment of Channell J. in this case was right. The language of s. 1 of the Public Authorities Protection Act, 1893, is reasonably plain, and it is manifest that 'continuance of the injury or damage' means the continuance of the act which caused the damage. It was not unreasonable to provide that, if there was a continuation of an act causing damage, the injured person should have a right to bring an action at any time within six months of the ceasing of the act complained of. But that is wholly inapplicable to such cases as the one before us, where there was no continuance of the act complained of, and where the only suggestion is that, in consequence of the negligent act, the plaintiff is not in such a good physical condition as she was before the accident." The report of this case appears only in the Justice of the Peace and the Times Law Reports. Whatever may be the proper inference to be drawn from that fact, the language used by the Lord Chancellor is unmistakably plain, and this Court must

(1) 67 J. P. 447; 20 Times L. R. 2.

accept it, and apply it. I cannot distinguish the facts of this case from the facts in *Carey's* case (1), and I am unable to agree with the view taken by the learned county court judge of a distinction which was suggested to him. The contention took this form. But for the defendant's negligence, it was said, the plaintiff would only have been laid up for so many weeks. The damage he suffered from loss of earning power during those weeks is attributable to the motor accident. The plaintiff's loss or damage due to the defendant's negligence only dates from the time when, but for that negligence, he would have regained his earning power. With every desire to assist the plaintiff, I am unable to accept this contention, and I think that the decision of the Divisional Court was right, and this appeal must be dismissed with costs.

SCRUTTON L.J. This case raises a question under the Public Authorities Protection Act. The plaintiff met with an accident on September 5, 1923, and was until October 15, 1923, under the care of the defendant, a doctor, under circumstances which imposed on the defendant a duty to use due care and skill in treating the patient. The plaintiff in fact had dislocated his hip, and the defendant through negligence did not discover it. The dislocation was therefore not replaced at a time when it would be easy to replace it. When it was discovered, after the plaintiff had left the defendant's care, a painful operation was necessary, and the leg was permanently injured. The plaintiff issued his writ on April 25, 1924, more than six months after he had ceased to be a patient of the defendant. There was here no act or neglect within the six months; the negligence did not continue, for the defendant's duty ceased on October 15. The fact that damage occurred within the six months before the writ, resulting from the preceding act or neglect, we are bound by *Carey's* case (1) to hold to be immaterial. I do not see my way to avoid the meaning of the words of the Act as interpreted in *Carey's* case. The appeal must be dismissed with costs.

(1) 67 J. P. 447.

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ATKIN L.J. In view of the decision in *Carey* v. *Bermondsey Borough Council* (1), which binds us, this appears to be a plain case. I agree with the judgments already delivered. The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *W. H. Thompson.*

Solicitors for the respondent: *Woolfe & Woolfe, for Wainwright, Woolfe & Browne, Great Grimsby.*

J. F. C.

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[IN THE COURT OF APPEAL.]

SLAYTOR *v.* NEWCASTLE-UPON-TYNE ASSESSMENT COMMITTEE.

Rating—Assessment—Gross estimated Rental—"Usual tenant's rate"—Portion imposed on Landlord—Union Assessment Committee Act, 1862 (25 *&* 26 *Vict. c.* 103), *s.* 15—*Newcastle-upon-Tyne Corporation (Rates) Act,* 1919 (9 *&* 10 *Geo.* 5, *c. lxix.*), *s.* 10.

By s. 15 of the Union Assessment Committee Act, 1862, "The gross estimated rental for the purpose of the Schedule to this Act shall be the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes" . . . . that is to say, the tenant undertaking to pay all usual tenant's rates and taxes.

By the Newcastle-upon-Tyne Corporation (Rates) Act, 1919, a local Act, a single rate known as the consolidated rate was substituted for the several rates theretofore existing. By s. 3 of the Act it was enacted that the consolidated rate meant the poor rate as by the Act authorized to be levied and collected; and by s. 7 the poor rate was to be called the consolidated rate of the parish for which the same should be levied. By s. 10: "One-eighth of the consolidated rate shall be borne by the owners of the property rated thereto, but in every case the whole rate shall be paid in the first instance by the occupiers of the property rated who are hereby empowered to deduct out of their rents the amounts paid by them on behalf of the owners: Provided," etc.:—

Held, that the consolidated rate to the extent of one-eighth thereof was a landlord's rate and was not a tenant's rate within the meaning of s. 15 of the Union Assessment Committee Act, 1862.

A hereditament in Newcastle was let to an occupier at a rent of 100*l.*

(1) 67 J. P. 447.

a year. The occupier at first paid all the rates imposed on him in respect of the hereditament, and deducted from the rent 7*l.*, being one-eighth of the consolidated rate, and paid 93*l.* to his landlord. Afterwards by agreement with his landlord the terms of the tenancy were altered, so that the occupier paid a rent of 93*l.* and paid the consolidated rate without deducting one-eighth or any other proportion therefrom. The hereditament was assessed at a gross estimated rental of 100*l.* The occupier appealed against the assessment, claiming that 93*l.* (the annual rent free from the 7*l.*, the one-eighth aforesaid, which he contended was a usual tenant's rate) was the gross estimated rental of the hereditament. The rating authority confirmed the assessment. Upon a special case stated on the occupier's appeal to quarter sessions,

Held, affirming the decision of a Divisional Court, that the sessions were warranted in fixing the gross estimated rental at 100*l.*

APPEAL from the decision of a Divisional Court upon a special case stated under the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 11.

The special case was as follows :—

1. The appellant is the occupier of a certain hereditament known as Whiteknights, Bellegrove, in the city and county of Newcastle-upon-Tyne. The respondents are the rating authority for the area within which the said hereditaments are situate.

2. On April 11, 1923, a rate for the parish of Newcastle-upon-Tyne was made, wherein the said hereditament was valued and rated at 100*l.* gross estimated rental and 83*l.* rateable value.

3. On September 28, 1923, a notice of objection to the valuation was given by the appellant to the Assessment Committee. On December 14, 1923, the Assessment Committee heard the objection and refused to grant relief and confirmed the valuation.

4. On November 28, 1924, the appellant gave notice of his intention to appeal to quarter sessions against the said refusal and against the rate. It was thereupon agreed between the appellant and the respondents that the facts should be stated in the form of a special case for the opinion of the King's Bench Division and that a judgment in conformity with the decision of the Court should be entered. . . . .

6. The facts and matters in question are as follows :—

(*a*) Sect. 136 of the Newcastle-upon Tyne Improvement

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Act, 1865 (28 & 29 Vict. c. ccl.), provided that one-fourth of the general rate and one-fourth of the improvement rate should be borne by the owners of property rated thereto respectively, but in every case the whole rate should be paid in the first instance by the respective occupiers of the property rated who were thereby empowered to deduct out of their respective rents the amounts paid by them on behalf of the owners.

(*b*) The last recited section was repealed by s. 4 of the Newcastle-upon-Tyne Corporation (Rates) Act, 1919 (9 & 10 Geo. 5, c. lxix.), which Act substituted for the several rates theretofore existing a single rate known as the consolidated rate. Sect. 10 provides as follows :—

"(1.) One-eighth of the consolidated rate shall be borne by the owners of the property rated thereto but in every case the whole rate shall be paid in the first instance by the occupiers of the property rated who are hereby empowered to deduct out of their rents the amounts paid by them on behalf of the owners: Provided that nothing in this sub-section shall affect the operation of any enactment lease or agreement (whether oral or in writing) under which the owner of the property rated is or shall be liable to pay the whole rate in respect of such property.

(2.) Any provision in any lease or in any agreement (whether oral or in writing) subsisting at the commencement of this Act which refers to the one-fourth of the general rate and one-fourth of the improvement rate or to the rates or proportion of rates payable by the owner of any property for which provision was made by s. 136 (one-fourth of rates payable by owner) of the Act of 1865 and by this Act repealed shall be construed and have effect as if such reference had originally been to the one-eighth part of the consolidated rate to be paid by the owner as in this section provided and any such provision which refers to the said general rate or the said improvement rate only

shall be construed and have effect as if such reference had originally been to one-half of such eighth part as aforesaid."

(*c*) For some time before April 1, 1923, the appellant was tenant of Whiteknights at a yearly rent of 100*l*. He had duly paid the whole rates imposed upon the property, and had deducted out of his rent one-eighth of the consolidated rate so paid by him.

(*d*) As from April 1, 1923, the terms of the appellant's tenancy were altered, so that he now pays as rent the yearly sum of 93*l*., but in addition bears the landlord's proportion of the consolidated rate and agrees not to deduct and has not deducted from his rent the one-eighth of the consolidated rate.

(*e*) At all material times the hereditament known as Whiteknights has been valued and rated at 100*l*. gross estimated rental and 83*l*. rateable value.

(*f*) For the purposes of the special case it is agreed that 7*l*. per annum represents one-eighth of the consolidated rate payable in respect of Whiteknights.

7. The appellant contends that the figure of 100*l*. is too high an assessment of the gross estimated rental, and that the proper gross estimated rental should be 93*l*., the clear annual sum which he pays to his landlord free of all usual tenant's rates and taxes and tithe commutation rentcharge.

8. The respondents contend that the proper figure for the gross estimated rental is 100*l*., and that the assessment or valuation ought not to be reduced by the 7*l*. which the tenant has contracted to pay or bear on behalf of his landlord, and that the said amount of 7*l*., representing one-eighth of the consolidated rate, is a landlord's rate and not a usual tenant's rate within the meaning of s. 15 of the Union Assessment Committee Act, 1862.

9. It is agreed that if the Court should find that the proper figure for the gross estimated rental is 93*l*., the rateable value should be reduced from 83*l*. to 77*l*. 10*s*.

The questions for the Court are :—

(*a*) Whether the 7*l*. per annum representing one-eighth of

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the consolidated rate is or is not a usual tenant's rate within the meaning of s. 15 of the Union Assessment Committee Act, 1862.

(*b*) Whether the proper figure for the gross estimated rental of the hereditament known as Whiteknights is 100*l.* or 93*l.*

The Divisional Court (Lord Hewart C.J. and Avory J.; Shearman J. dissenting) held that the 7*l.* per annum representing one-eighth of the consolidated rate was not a usual tenant's rate; and held unanimously that the proper figure for the gross estimated rental of the hereditaments was 100*l.*

The appellant appealed to this Court.

Mitchell-Innes K.C. and *R. Strother Stewart* for the appellant. Upon the first question, the majority of the Divisional Court were wrong in holding that the sum of 7*l.*, representing one-eighth of the consolidated rate, was not a usual tenant's rate within the meaning of s. 15 of the Union Assessment Committee Act, 1862. That Act commences with a recital that "it is expedient that more effectual provision should be made for securing uniform and correct valuations of parishes in the unions of England." Uniformity of valuation being one of the objects of the Act, s. 15 provides: "The gross estimated rental for the purpose of the Schedule to this Act shall be the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any: Provided," etc. . . . . The words "free of all usual tenant's rates" have been explained in *Reg.* v. *Hall Dare* (1) and by the Legislature in the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4, as meaning "if the tenant undertook to pay all usual tenant's rates." The question then is whether the consolidated rate in Newcastle-upon-Tyne is a usual tenant's rate. The Newcastle-upon-Tyne Corporation (Rates) Act, 1919, repealed previous private Acts dealing with the rates in Newcastle. It recites that all the expenses of the corporation have been payable out of the city fund and the city rate,

(1) (1864) 5 B. & S. 785, 794.

the general rate authorized by the Newcastle-upon-Tyne Improvement Act, 1865 (28 & 29 Vict. c. ccl.), as amended by the Newcastle-upon-Tyne Corporation Act, 1904 (4 Edw. 7, c. ccxx.), the improvement rate authorized by the Act of 1865 as amended by three other Acts, the tramway rate, the district fund and the general district rate; and that it was expedient that all the said expenses of the corporation should be defrayed out of the city fund and city rate; and then proceeds to enact by s. 3, the interpretation section, that the consolidated rate means the poor rate by the Act authorized to be levied and collected; by s. 5 that all the above mentioned expenses of the corporation shall be paid out of the city fund and city rate; by s. 6 that the contribution of the parish to the city shall be paid by the overseers out of the poor rate; by s. 7 that "The poor rate (inclusive of the contributions to the city rate levied as part thereof in pursuance of the provisions of this Act) shall be called the consolidated rate of the parish for which the same shall be levied." Sect. 10 must be read in the light of these recitals and sections. There can be no doubt that throughout the country generally the poor rate is a tenant's rate. It is therefore a usual tenant's rate. It does not cease to be a usual tenant's rate because by a special local Act concerning Newcastle-upon-Tyne alone it is called a consolidated rate and one-eighth of it falls on the owner of the hereditament. It is a usual tenant's rate, no matter how much a tenant actually pays in respect of it. In *Reg.* v. *Dodd* (1), where the owner was assessed to the rates, and, on his undertaking to pay whether the tenement was occupied or not, was only liable to pay one-half, it was held that the full rate was a usual tenant's rate and must be deducted in arriving at the gross estimated rental. Being a usual tenant's rate, this one-eighth cannot form an item in the gross estimated rental of the hereditament. The gross estimated rental is hypothetical, just as the tenant who is supposed to pay it is hypothetical. "It is only used as a standard which must be examined without regard to the

(1) (1865) L. R. 1 Q. B. 16.

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actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt": per Lord Buckmaster, *Poplar Assessment Committee* v. *Roberts*. (1)

Mundahl for the respondents. The decision of the Divisional Court was right and should be affirmed. The consolidated rate to the extent of one-eighth is a landlord's rate; it must ultimately fall on the landlord: *Dawson* v. *Linton* (2); *Baker* v. *Greenhill*. (3) If this one-eighth had been imposed on the landlord by one Act and the remaining seven-eighths on the tenant by another Act, could there have been any doubt that the one-eighth was a landlord's tax? It is immaterial who pays it in the first instance. The tenant pays his landlord's property tax in the first instance, but beyond question it is a landlord's tax. The test is, who is ultimately called upon to pay the tax? *Reg.* v. *Hall Dare*. (4) A "usual tenant's rate" does not mean one which in most parts of the country is a tenant's rate, but one which is a usual tenant's rate in the district containing the hereditament. The object of s. 15 of the Union Assessment Committee Act, 1862, is to ascertain the value of the occupation, and that must have reference to the district or neighbourhood in which the hereditament is situate. If landlords paid part of the poor rate in one county the occupation of a hereditament in that county would be more valuable than it would be if the tenants paid the whole rate: Ryde on Rating, 5th ed. (1925), p. 209, citing *Slade* v. *Bristol Overseers* (5); *Rex* v. *Shoreditch Assessment Committee*. (6) How is that affected by the fact that in the rest of England the tenants pay the whole rate? The value of the appellant's occupation is 100*l.* a year. He pays 93*l.* as rent eo nomine, and 7*l.*, really as rent, nominally as the one-eighth of the consolidated rate which the landlord is responsible for.

Mitchell-Innes in reply.

(1) [1922] 2 A. C. 93, 104.
(2) (1822) 5 B. & Al. 521.
(3) (1842) 3 Q. B. 148.
(4) 5 B. & S. 785.
(5) (1910) 74 J. P., p. 629.
(6) [1910] 2 K. B. 859.

BANKES L.J. This is an appeal from the decision of a Divisional Court on a case stated on an appeal to quarter sessions and raising questions of the effect of the Newcastle-upon-Tyne Corporation (Rates) Act, 1919, s. 10, upon the assessable value of hereditaments in the city of Newcastle.

The real question is whether that section has the effect of converting one-eighth of the consolidated rate, which but for the section would clearly be a tenant's rate, into a landlord's rate; if the section has that effect, then from the amount which the tenant pays in rent, rates and taxes together, this one-eighth must not be deducted in arriving at the gross estimated rental of the tenement; if the whole rate remains a tenant's rate then the one-eighth must be deducted. That is the effect of the Union Assessment Committee Act, 1862, a statute intended to prescribe a uniform method of arriving at the gross estimated rental of hereditaments throughout the country. Sect. 15 provides that "the gross estimated rental for the purpose of the Schedule to this Act"—that is for the valuation list—"shall be the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rentcharge, if any." The expression "free of all usual tenant's rates and taxes" means that the tenant is to be taken as paying all the usual tenant's rates and taxes. This consolidated rate is by s. 3 of the local Act defined to be a poor rate; and if the Act stopped there it would obviously be a usual tenant's rate, that is a rate which in ordinary circumstances is payable by the tenant and not by the landlord. I do not mean payable by virtue of any private arrangement between landlord and tenant; what they may agree between themselves is for this purpose immaterial. As was said by Lord Sumner in *Poplar Union Assessment Committee* v. *Roberts* (1): "Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers"; and that, I take it, means that the contract between landlord and tenant is not conclusive in considering what is the gross estimated

(1) [1922] 2 A. C. 93, 116.

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rental of a rateable hereditament. Therefore when one defines usual tenant's rates and taxes as rates and taxes usually payable by the tenant the word "payable" is to be understood as meaning payable by statute or by some other rule of positive law, and not payable by agreement. If that is right, then, looking at the matter in the light of s. 10 of the Newcastle-upon-Tyne Corporation (Rates) Act, 1919, is it to be said that this one-eighth, though it be a fraction of what is usually a tenant's rate, is payable by the tenant? The statute says it shall be borne by the owners of the property rated thereto; in other words, although in other circumstances the whole of this consolidated rate would be a usual tenant's rate, a proportion of it is by statute payable by the landlord and not by the tenant. In these circumstances I am of opinion that the answer to the first question submitted by the special case is that the 7*l.* per annum representing one-eighth of the consolidated rate is not a usual tenant's rate within the meaning of s. 15 of the Union Assessment Committee Act, 1862. As I read it, the judgment of Avory J. rests on the principle I have endeavoured to state. It is exactly in accordance with the view taken by the learned judge in his dissenting judgment in *Piggott* v. *Cuckfield Union Assessment Committee* (1), where he said: "It is suggested that that half" [of the rate] "does not come within the expression 'usual tenant's rates,' but in my opinion in order to ascertain what are the usual tenant's rates payable in respect of a particular hereditament recourse must be had to the statute which regulates the payment of such rates." The other members of the Court differed from Avory J. in that case on the grounds put by Horridge J. (2)—namely, that a hypothetical tenant under the Parochial Assessments Act, 1836, would not be entitled to the remission of half the rates because by the Act under consideration in that case—the Tithe Rentcharge (Rates) Act, 1899—the right to remission is conferred only upon the owner of the rentcharge, a term which by the Tithe Act, 1836, excludes every tenant of a

(1) [1921] 2 K. B. 647, 654. (2) [1921] 2 K. B. 657.

rentcharge whose term does not exceed fourteen years; and that the Tithe Rentcharge (Rates) Act, 1899, "has no reference to the assessment of the rateable value; it deals only with the relief from payment of a portion of the rates based upon an assessment arrived at in the ordinary way." Be that as it may, s. 10 of the Newcastle-upon-Tyne Corporation (Rates) Act, 1919, has direct reference to the assessment of rateable value; and it provides that of this consolidated rate a proportion shall be an owner's rate and a proportion shall be a tenant's rate, although as between himself and the corporation the tenant has to pay the whole rate in the first instance. That being so, the one-eighth is a landlord's rate and is not to be deducted from the amount which the tenant pays in rent, rates and taxes for the purpose of arriving at the gross estimated rental under s. 15 of the Union Assessment Committee Act, 1862.

The answer to question (*b*) follows from the answer to question (*a*). The proper figure for the gross estimated rental of the hereditament is 100*l.* and not 93*l.* The appeal must therefore be dismissed.

SCRUTTON L.J. I am of the same opinion. The city of Newcastle-upon-Tyne has for nearly a hundred years adopted a somewhat peculiar system of rating, a system whereby in several instances the rate is levied in the first instance on the occupier, but he is enabled to recover a proportion of it from the owner, so that this proportion ultimately falls upon the owner. The hereditament in this case was rated at 100*l.* The rent was 100*l.* The tenant paid this rent, and he also paid the consolidated rate and then recovered from the landlord 7*l.*, the equivalent of one-eighth of that rate. So he paid 100*l.* net in respect of rent. Then the rent was reduced from 100*l.* to 93*l.*, but the tenant gave up his right to recover one-eighth of the consolidated rate from the owner. He paid 7*l.* less in rent and 7*l.* more in rate, so that financially he was just where he was before. Now this tenant and the Assessment Committee want to know what is the effect of this provision in the local Act that one-eighth of the

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consolidated rate is to be paid by the tenant in the first instance and then recovered from the owner.

The Legislature has laid down the standard of rating. In the Parochial Assessments Act, 1836, and the Union Assessment Committee Act, 1862, it is "an estimate of the annual value, that is to say of the rent at which the same"—i.e., the hereditament—"might reasonably be expected to let from year to year free of all usual tenant's rates and taxes"; that is the standard. The actual rent is not the standard, though it may be used as prima facie evidence of the rent at which the hereditament might reasonably be expected to let from year to year; but the standard is the rent which a hypothetical tenant might reasonably be expected to pay for the hereditament free of all usual tenant's rates and taxes. What is meant by the expression, "free of all usual tenant's rates and taxes"? The tenant is not free of them; it is contemplated that he shall pay them. The premises are not free of tenant's rates and taxes; the tenant pays them in respect of the premises. It must be the landlord who is "free of . . . . tenant's rates and taxes." This question was set at rest by the Metropolis Valuation Act, 1869, where instead of the words "free of all usual tenant's rates and taxes" were substituted the words "if the tenant undertook to pay all usual tenant's rates and taxes."

The first question asked by the special case concerns this one-eighth of the consolidated rate, which is paid in the first instance by the tenant but is subsequently recoverable from the landlord: Is it a usual tenant's rate? Or, in other words, when a hypothetical tenant is computing what rent he may reasonably pay should he take into consideration this one-eighth as one of his outgoings in respect of the hereditament? To my mind much light is thrown on this question by the words of Cockburn C.J. in *Reg.* v. *Hall Dare* (1) in considering whether a particular sewers rate was a landlord's or a tenant's rate. "This," said the Lord Chief Justice, "is a tax to which the tenant is liable to be assessed and which he is bound to pay, and which he is not able to call

(1) 5 B. & S. 785, 795.

upon his landlord to reimburse him. It is properly and essentially a tenant's tax, which is a tax which the tenant in occupation is not only primarily but ultimately called on to pay, and, being so, is to be deducted from the rent in calculating the rateable value." This one-eighth of the consolidated rate is a rate which the tenant is able to call upon his landlord to reimburse him; it is not a rate which the tenant is ultimately called on to pay. It seems to me it is not a tenant's rate at all. It is not a tax which a hypothetical tenant calculating his rent will assume he must pay as one of his outgoings. This relieves me of the question whether it is a usual tenant's rate. It is not a tenant's rate at all, and therefore is not to be deducted. This answers the first question.

From one point of view the second question looks like a question of fact, but I think it must be taken to mean this: On the facts stated in this case, is it open to us, the Court of quarter sessions, to find that the gross estimated rental is 100*l*.? When the tenant paid 100*l*. as rent he could recover this 7*l*., one-eighth of the consolidated rate which he had paid, from his landlord. When he altered the amount of his rent by agreement, he took the burden of paying the 7*l*., the one-eighth of the consolidated rate. Now the amount paid nominally in respect of rent by an actual tenant is not necessarily the rent which the hypothetical tenant will pay; the nominal rent may include a water rate which the tenant is entitled to deduct; and just as in *Smith* v. *Birmingham Churchwardens* (1) the tenant was entitled to deduct water rate, although the landlord had agreed with the water authority to pay it, so here the tenant must add to the nominal rent a landlord's rate, which however the tenant has agreed to pay. He is ready to pay a nominal rent of 93*l*. and to bear a landlord's tax of 7*l*. On these facts I think the Court of quarter sessions were warranted in finding that the gross estimated rental of the hereditaments was 100*l*. It is said that this decision will be regarded by the Assessment Committee as an authority for adding 7*l*. or one-eighth of the consolidated rate

(1) (1888) 22 Q. B. D. 211, 703.

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to the assessment of every occupier in Newcastle. Nothing I have said justifies such a course. On the facts stated in this case the addition is justified. I have decided nothing beyond that.

EVE J. I agree. So far from disturbing, this decision tends to maintain, the uniformity of assessment aimed at by the Union Assessment Committee Act, 1862. "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament." That is the principle laid down by Lord Buckmaster in *Port of London Authority* v. *Orsett Union Assessment Committee.* (1) We should be acting contrary to that principle if we were to ignore the relief afforded to the hypothetical tenant in this case by the ultimate imposition of this proportion of the consolidated rate upon the owner. I think therefore that the first question should be answered by declaring that the 7*l.* per annum representing one-eighth of the consolidated rate is not a usual tenant's rate within the meaning of s. 15 of the Union Assessment Committee Act, 1862; and treating the second question as confined to this particular case, I agree that 100*l.* and not 93*l.* is the proper figure for the gross estimated rental of the hereditament known as Whiteknights.

Appeal dismissed.

Solicitors for appellant: *Doyle, Devonshire & Co., for Molyneux, McKeag & Cooper, Newcastle-upon-Tyne.*

Solicitors for respondents: *King, Wigg & Co., for Wilkinson & Marshall, Newcastle-upon-Tyne.*

(1) [1920] A. C. 273, 305.

W. H. G.

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Nov. 4.

[1924. L. 2993.]

Landlord and Tenant—Lease—Covenant by Lessee to pay "assessments, impositions and outgoings"—Holding over—Yearly Tenancy—Paving Expenses under Private Street Works Act, 1892*—Liability of Tenant—Agricultural Holdings Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 16, 57.

A lease for seven years contained a covenant by the lessee to pay all "assessments, impositions and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax."

At the expiration of the lease the lessee held over as tenant from year to year (as McCardie J. found) upon the terms of the covenants contained in the lease. During the tenancy the Urban District Council served a notice upon the owners and recovered payment of 188*l.* in respect of work done under the Private Street Works Act, 1892. In an action by the owners to recover this sum from the tenant under the above covenant:—

Held, that the payment was an imposition or outgoing for which the tenant was liable within the meaning of the covenant, and that this liability was not affected by the fact that the tenancy was a yearly tenancy only.

Valpy v. *St. Leonards Wharf Co.* (1903) 67 J. P. 402 and 1 L. G. R. 305, and *Harris* v. *Hickman* [1904] 1 K. B. 13 not followed.

ACTION tried by McCardie J. without a jury.

By a lease dated May 14, 1885, the plaintiff's predecessors in title demised to the defendant a plot of land known as Lord's Close fronting Ferry Road (then known as Ferry Lane), Barnes, in the county of Surrey, at an annual rent of 46*l.* for seven years from September 29, 1884. At the expiration of this lease the defendant held over, and had since that time remained in occupation as tenant from year to year. The lease contained a covenant by the defendant that he would "pay during the said term all taxes, rates, tithes, assessments, impositions and outgoings now payable or hereafter to become payable by or be imposed upon either landlord or tenant in respect of the premises except the landlord's property tax." By notice dated October 24, 1924, the Barnes Urban District Council required the plaintiffs to pay 188*l.* in respect of expenses incurred for paving and making-up Ferry Road under the Private Street Works Act,

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1892, and the plaintiffs in December, 1924, paid this sum to the Council.

By specially endorsed writ dated December 31, 1924, the plaintiffs claimed payment of this 188*l.* from the defendant, as being an imposition or outgoing within the meaning of the above covenant in the lease.

The defendant pleaded in his defence: (1.) that the above covenant in the lease was not a covenant applicable to a yearly tenancy or, in the alternative, was not an assessment, outgoing or imposition, within the contemplation of the parties to the lease, and (2.) that the claim was not maintainable in an action at law by reason of the Agricultural Holdings Act, 1923, s. 16.

The facts as found by McCardie J. were as follows: The plot of land known as Lord's Close consisted of nine acres and was part of an estate of 180 acres belonging to the Lowther family. The defendant first became tenant of the plot in 1878, and used it as an orchard with an undergrowth of rhubarb and plants, of which he sold the produce. The estate was suitable for building, and in 1908 a sewer was laid by the Barnes Urban District Council upon part of the plot, compensation for this, amounting to 56*l.*, being then paid to the defendant. In 1913 it was necessary to widen Ferry Road at the side of the defendant's plot, and part of the plot was then cut off and thrown into the highway. Further alterations were carried out to the defendant's frontage in 1914, for which 70*l.* compensation was then paid to him. The paving of Ferry Road, the payment for which formed the subject of the present action, was carried out by the District Council in 1923 under powers contained in the Private Street Works Act, 1892. The total frontage abutting on the Ferry Road was 800 feet, the road being paved and made up to a distance of about 150 feet.

Holman Gregory K.C. and *Wynn Werninck* for the plaintiffs. The payment here was an "outgoing" or an "imposition" within the covenant in the lease: *Foulger* v. *Arding* (1); *In re Warriner.* (2) This covenant applies to the tenancy

(1) [1902] 1 K. B. 700. (2) [1903] 2 Ch. 367.

from year to year which followed on the lease : for the matter is one which may reasonably be supposed to have been contemplated by the parties as being within the scope of the contract. In *Harris* v. *Hickman* (1), where the tenancy was from year to year, Wright J. held that he was bound by the decision of Farwell J. in *Valpy* v. *St. Leonards Wharf Co.* (2); but since the decision of the Court of Appeal in *Stockdale* v. *Ascherberg* (3) these two decisions cannot be considered as binding upon the Court. The fact that the term is a short one will not affect the tenant's liability : see Foà on Landlord and Tenant, 6th ed., p. 221.

Eustace Hills K.C. and *Elliot Gorst* for the defendant. This covenant does not apply to a tenancy from year to year. *Valpy* v. *St. Leonards Wharf Co.* (2) and *Harris* v. *Hickman* (1) are still good law upon this point and were not overruled by *Stockdale* v. *Ascherberg* (3), where Wright J. in his judgment in the Court below drew a distinction between a tenancy from year to year, as in the first two cases, and a short term, as in *Stockdale* v. *Ascherberg.* (3) In the latter case the tenancy was for three years, whereas here there is a yearly tenancy by holding over. The payment here is not of a kind which can be assumed to have been in the contemplation of the parties to the contract.

There is a further objection that this is an agricultural " holding " within the definitions contained in the Agricultural Holdings Act, 1908, s. 48, and in the Agricultural Holdings Act, 1923, s. 57, and therefore by the latter Act, s. 16, sub-s. 1, the question can only be decided by arbitration ; for the question here is whether a certain term is to be imported into the lease. The words " arising out of the termination of the tenancy of the holding " in that sub-section only apply to the last of the classes of question or difference there mentioned and not to those mentioned previously. As regards these previous classes they must be decided by arbitration, even if they arise during the continuance of the tenancy as here.

(1) [1904] 1 K. B. 13. (2) 67 J. P. 402 ; 1 L. G. R. 305.
(3) [1904] 1 K. B. 447.

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Holman Gregory K.C. in reply. This is not an agricultural "holding" within the statutory definition, but in any case the jurisdiction of this Court is not ousted by the Agricultural Holdings Act, 1923, s. 16. It is clear from *Rex* v. *Powell* (1) and *Harrison* v. *Ridgway* (2) that the words "arising out of the termination of the tenancy" in s. 16, sub-s. 1, refer to all the preceding classes of difference and not only to the last limb of the sentence. The Act of 1923 is a consolidating statute, and s. 16 is not intended to enlarge those matters which must be referred to arbitration, but only affects the method of arbitration to be employed under those statutes on the subject which were in force before 1923.

MCCARDIE J. [after stating the above facts continued:] In this case there was a lease for seven years, and at the expiration of the lease the defendant, the lessee, stayed on as the plaintiff's tenant from year to year. I have no doubt that he did so upon the terms of the expired lease. The first question which I have to decide is whether the words "assessments, impositions, and outgoings" as used in the covenant in the lease are sufficient to cover the payment here claimed. The word "assessments" would be inadequate if taken by itself, because it imports a payment regularly repeated rather than one which is independent and casual. The meaning of "outgoings" has been considered in many decisions, and the term has been held to apply in cases where it has been necessary to lay drains under the Public Health Act, to meet paving expenses, to reconstruct drains, and to meet expenses under the Private Street Works Act, 1892. I have no doubt that the words "outgoings to be imposed on the tenant" include the burden here created.

As regards the word "impositions" it appears from the decisions that the meaning to be given is as wide as that given to "outgoings": *Foulger* v. *Arding* (3); *In re Warriner* (4); and *George* v. *Coates*. (5) It is true that in documents of kind regard must be had to the context in order

(1) [1925] 1 K. B. 641.
(2) (1925) 133 L. T. 238.
(3) [1902] 1 K. B. 700.
(4) [1903] 2 Ch. 367.
(5) (1903) 88 L. T. 48.

to see whether it cuts down the prima facie meaning of the words in question. But there is nothing in the context here which would cut down the meaning of the covenant. In my view the words of the lease are adequate, and I think that the liability of the tenant is not destroyed by the mere circumstance that he is in occupation upon a tenancy of short duration. This view is supported by the decisions in *Batchelor* v. *Bigger* (1); *Foulger* v. *Arding* (2); *In re Warriner* (3); and *Stockdale* v. *Ascherberg.* (4) Indeed the tenant has been held liable, even though his tenancy has expired before the work in respect of which payment is claimed has been commenced, and when he can therefore derive no advantage from it: *Wix* v. *Rutson.* (5) Two cases have been cited for the defendants on this point which call for comment: *Valpy* v. *St. Leonards Wharf Co.* (6) and *Harris* v. *Hickman* (7), both of which relate to tenancies from year to year. In so far as these decisions indicate that the shortness of the tenancy relieves the tenant of the burden of the covenant in the lease, I think that they are inconsistent with the other authorities which have been cited. I see no reason to cut down the effect of this main body of authority by subtle distinctions, even if in the result hard cases may arise. The effect of the decisions should be stated broadly, so that some working rule may be said to exist. It has been said in many cases that some test should be given by which the liability of the tenant under the covenant could be determined. Such a test is given by Collins M.R. in *Foulger* v. *Arding* (8), where, in discussing the meaning of the term "impositions" in a covenant of this kind, he says that "underlying the whole matter is the consideration that we are dealing with a contract of demise between landlord and tenant, and the covenant must be assumed to relate only to matters which may reasonably be supposed to have been contemplated by the parties as being within the purview of such a contract." If that be the true test, then the facts in this case are adverse

(1) (1889) 60 L. T. 416.
(2) [1902] 1 K. B. 700.
(3) [1903] 2 Ch. 367.
(4) [1904] 1 K. B. 447.
(5) [1899] 1 Q. B. 474.
(6) 67 J. P. 402; 1 L. G. R. 305.
(7) [1904] 1 K. B. 13.
(8) [1902] 1 K. B. 700, 706.

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to the defendant. He has been in possession for nearly forty years, and has watched the development of this land, and he must have contemplated the possibility that the construction and improvement of the roads might cause an increase of the burdens falling upon the tenant. That disposes of the main point in the case. The second point taken for the defendant is that the Court has no jurisdiction to try the action and that it should have gone to arbitration under the Agricultural Holdings Act, 1923, s. 16. Is this an agricultural "holding" within the definition in s. 57? This provides that the term "holding" shall not include "an allotment, garden or include any land cultivated as a garden, unless it is cultivated wholly or mainly for the purpose of the trade or business of market gardening, but, except as aforesaid, means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden. . . . ." I do not think that the present holding falls within that definition. It was an orchard, and not a market garden in the ordinary sense. The test is the dominant purpose of the cultivation, and it seems to me that here the cultivation of rhubarb and flowers was quite subordinate to that of an orchard. That really disposes of the case; but even if this is a holding within s. 57 of the Agricultural Holdings Act, 1923, I do not think that s. 16 of that Act applies so as to exclude the jurisdiction of this Court. The cases of *Simpson* v. *Batey* (1); *Rex* v. *Powell* (2); and *Harrison* v. *Ridgway* (3) have been cited to me, and while I do not propose to analyse the section, it appears to me that s. 16 applies only to questions arising on the determination of the tenancy. I do not think, having regard to the words of s. 16, that the present dispute falls within its scope.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Foyer, White, Borrett & Black.*

Solicitors for defendants: *Howard & Shelton, for Garner & Son, Hounslow.*

(1) [1924] 2 K. B. 666. (2) [1925] 1 K. B. 641. (3) 133 L. T. 238.

F. P. F.

THE KING *v.* HERTFORDSHIRE JUSTICES.

1925
Nov. 10.

Ex parte LARSEN.

Justices—Jurisdiction—Preliminary Inquiry as to Committal for Trial—Equal Division of Opinion—Power to adjourn for Rehearing before differently constituted Tribunal—Indictable Offences Act, 1848 (11 & 12 *Vict. c.* 42), *s.* 25.

Where on the preliminary inquiry under s. 25 of the Indictable Offences Act, 1848, whether or not an accused person shall be committed for trial for an indictable offence the justices are equally divided in opinion, they have power to adjourn the inquiry for rehearing before themselves or before a differently constituted tribunal.

Reg. v. *Ashplant* (1888) 52 J. P. 474 explained.

RULE NISI for mandamus.

The applicant, Jacob Marius Larsen, was on September 23, 1925, charged at the Cheshunt petty sessions, under s. 35 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), that he by wanton driving of a motor car did cause grievous bodily harm to one Richard Whiting. The hearing was adjourned to October 14, and at the conclusion of the evidence, both for the prosecution and for the defence, the justices retired, and returned into court with the announcement that they were equally divided in opinion on the question whether or not the applicant should be committed for trial for an indictable offence under s. 25 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), and had decided to adjourn the case to October 28, 1925, to be reheard before a reconstituted tribunal. After further argument, when it was contended on behalf of the applicant that in the circumstances it was the duty of the justices, under s. 25 of the last mentioned Act (1), to discharge him from custody, the justices

(1) Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 25: "When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the . . . . justices . . . . then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such . . . . justices shall forthwith order such accused party, if in custody, to be discharged. . . . ."

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adhered to their decision. This rule, calling upon the justices to show cause why they should not discharge the applicant from custody, was then obtained.

Roland Oliver K.C. and *E. H. Tindal Atkinson* showed cause. The justices had a right to adjourn for the case to be considered by a reconstituted court, and that is all that is contended for. They had a discretion in the matter, in the exercise of which the Court will not interfere.

[AVORY J. This is really a mandamus to justices to make up their minds. If this was the case of a stipendiary magistrate we could not grant a mandamus if he adjourned in order to enable himself to make up his mind.

LORD HEWART C.J. How can justices be said to "be of opinion that [the evidence] is not sufficient" within the meaning of s. 25 of the Act of 1848, when they are equally divided in opinion?]

They cannot be said to be so. The language of s. 14 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), the framework of which is exactly the same as that of s. 25 of the first mentioned Act, is stronger, because it says that the justices "shall convict him or make an order against him"—that is, come to a decision. Nevertheless the authorities show that acting under that section they may adjourn. And earlier authorities are to the same effect: see *Bodmin* v. *Warligen* (1) and *Rex* v. *Leicestershire Justices* (2). *Kinnis* v. *Graves* (3) and *Bagg* v. *Colquhoun* (4) are conclusive against the applicant. In those cases justices had to come to a determination under the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), and the Licensing Acts respectively, and, being equally divided, adjourned, and it was held that they had adopted the proper course. The present case, in which the justices were only holding a preliminary inquiry, is a fortiori.

Reg. v. *Ashplant* (5) is said to be in the applicant's favour.

(1) (1750) 2 Bott & Const (6th ed.), para. 982, p. 756.
(2) (1813) 1 M. & S. 442.
(3) (1898) 67 L. J. (Q. B.) 583.
(4) [1904] 1 K. B. 554.
(5) 52 J. P. 474, 475.

The Court in that case on an application for a rule for a mandamus to hear and determine refused the rule, and Manisty J. said: "If the justices are divided in opinion the proper thing is to dismiss the summons." But these words were applied to the particular facts of that case, in which there had been three hearings, a case stated and two equal divisions of opinion by the justices. If they mean more it is submitted that they are wrong.

[The argument of Lawson Walton Q.C. in *Ex parte Morgan Evans* (1) and the case of *Rex* v. *Tipperary Justices* (2) were also referred to.]

In its discretion the Court ought to refuse the rule, because it cannot be sure that to grant it will effect any result, for there would be nothing in that event to prevent the prosecution from starting the prosecution afresh before the same tribunal, though no doubt this would not be done unless they had some fresh evidence. Or a voluntary bill might be preferred before the grand jury, the case not being within the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17).

[AVORY J. This rule calls on the justices to discharge the applicant. But he is not in their charge, he is in the gaoler's charge, and this should be a rule for a writ of habeas corpus directed to the gaoler.]

Sir H. Curtis Bennett K.C. and *Keeves* in support. It is not disputed that in summary jurisdiction cases justices may adjourn. But there is a distinction between cases where justices have to consider guilt or innocence and cases where they have to consider whether there is sufficient evidence to justify committal for trial. In the latter case, if they are of opinion that there is not sufficient evidence it is their duty to discharge. It is admitted that the justices might have adjourned for a further hearing before themselves, but not, as in fact they did, for a hearing by a differently constituted bench.

[AVORY J. Is it not ordinary practice to take evidence before a single justice, who then adjourns the case for hearing before several justices?]

(1) [1894] A. C. 16, 17. (2) [1903] 2 I. R. 108, 112.

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Yes; but here the whole of the evidence both for the prosecution and defence was heard by these justices. Sect. 25 of the Act of 1848 means that unless satisfied that the evidence is sufficient the duty of justices is to discharge from custody. It was only in the event of their being of opinion that a jury was likely to convict that it was their duty to commit for trial, and how could they say that they thought that, in view of the fact that they were equally divided in opinion on the question whether there was a prima facie case against the applicant? If the case had been heard before a stipendiary magistrate and he was left in a similar state of mind, clearly his duty would be to refuse to commit for trial; he could not adjourn the case for hearing before another stipendiary magistrate. *Reg.* v. *Ashplant* (1) is relied on.

[*Garton* v. *Southampton Justices* (2); *Cox* v. *Coleridge* (3); and *Rex* v. *Marsh* (4) were also referred to.]

Roland Oliver K.C. replied on the cases.

LORD HEWART C.J. This is a rule nisi for a mandamus directed to Hertfordshire justices ordering them to discharge the applicant, Jacob Marius Larsen, from custody pursuant to s. 25 of the Indictable Offences Act, 1848. Larsen was charged for that he by wanton driving caused grievous bodily harm to one Whiting. The ground upon which the rule was granted was that as the justices were equally divided on the question whether or not they should commit Larsen for trial on that charge they ought to have released him from custody.

I am clearly of opinion that the rule ought to be discharged. The argument in support of the rule appears at the outset to be based on a misreading of s. 25 of the Act of 1848. That section does indeed lay down the condition subject to which it is the duty of justices forthwith to order that an accused person be discharged, but it is important to observe what the terms of that condition are. Sect. 25 says: "If the . . . . justices . . . . then present shall be of opinion that [the evidence] is not sufficient to put such accused party upon

(1) 52 J. P. 474.
(2) (1893) 57 J. P. 328.
(3) (1822) 1 B. & C. 37, 49–50.
(4) (1837) 6 L. J. (M. C.) 153.

his trial for any indictable offence, such . . . . justices shall forthwith order such accused party . . . . to be discharged." In other words the duty in such circumstances to discharge arises when, and only when, the justices have reached an actual opinion that the evidence is not sufficient. No such duty arises where as yet the justices have not succeeded in reaching that opinion, and where, as here, the justices, believing that the issue is worthy of further investigation, propose to adjourn, and, if need be, rehear the case. The argument for the applicant seems to involve the transposition of certain words in the first part of s. 25. As the section stands it provides for the case where justices are of opinion that the evidence is not sufficient to justify committal for trial. As the argument seems to demand these words would have to run as follows: "If the justices shall not be of opinion that the evidence is sufficient," with the result that a prisoner at some interim stage of the proceedings might call for his discharge because as yet the justices had not reached the stage of forming an opinion, one way or the other, whether the evidence was sufficient. It seems to me that the conclusion to be drawn from the express terms of the section itself is reinforced by the line of cases to which the Court has been referred. When one looks at such cases as *Rex* v. *Leicestershire Justices* (1); *Ex parte Morgan Evans* (2); *Kinnis* v. *Graves* (3); *Rex* v. *Tipperary Justices* (4); and *Bagg* v. *Colquhoun* (5), it is perfectly obvious that where justices are sitting as a court of summary jurisdiction to decide whether or not a defendant is to be convicted, they may adjourn and rehear, and, as in this case, if they think fit, reconstitute the court. The argument which has been addressed to us says in terms that it is well enough that justices who are sitting as a court of summary jurisdiction should enjoy these extended opportunities of arriving at a final decision, but that where justices are sitting to determine under the Indictable Offences Act, 1848, whether an accused

(1) 1 M. & S. 442.
(2) [1894] A. C. 16.
(3) 67 L. J. (Q. B.) 583.
(4) [1903] 2 I. R. 108, 112.
(5) [1904] 1 K. B. 554.

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person shall be committed so that he may be tried on indictment, it is not well that there should be any opportunity of adjourning. Speaking for myself I think the latter case is an a fortiori one in favour of a further opportunity for a decision, where the matter which is being dealt with arises under the Indictable Offences Act, 1848. I find it difficult to see how it can be reasonable that justices who have the task of making up their minds whether there is sufficient evidence upon which then and there the defendant should be convicted should have the opportunity of adjourning and rehearing, while that opportunity should be denied to justices who have the preliminary task of deciding whether the evidence is such that the defendant ought to be tried on indictment. As far as I understand it, the line of authority is all one way, and is against the argument in support of this rule. Reference has been made to *Reg.* v. *Ashplant* (1), where it is quite true that Manisty J., with the express approval of Lord Coleridge C.J., said that if the justices were equally divided in opinion the proper course was to dismiss the summons. But that observation must be read with reference to the facts of that case. There had been a hearing and a rehearing, and the learned judge meant that in such a case of division of final opinion there must be some determination, and that in those circumstances it was the duty of the justices to dismiss the summons. It is idle to say that the decision on that particular state of facts amounted to a decision that where justices disagree they must dismiss and never adjourn and hear further. If that were the proper interpretation of the words of Manisty J. it would be a judgment contrary to a great mass of authority, and also contrary to right reason. No difficulty appears to arise from the fact in this case that it was proposed on the rehearing to reconstitute the court. Why should it not be reconstituted? It would appear eminently desirable that it should be reconstituted, and that the court should then be composed of an uneven number of justices.

For these reasons the rule, I think, should be discharged.

(1) 52 J. P. 474.

AVORY J. I am of the same opinion. Apart from the form of the rule it seems to me that in effect we are being asked to order the justices that they shall be of opinion that the evidence is not sufficient to put the applicant on his trial. When that is realized it is clear that it is impossible for us to order anybody to be of a certain opinion when they either entertain a contrary opinion or have no opinion. Again the form of the rule illustrates the impossibility of the remedy sought. We are asked to order ten particular individuals to discharge a person from custody. In fact he is not in their custody. Quite apart from that point, suppose that the rule could be moulded so that these ten gentlemen could be ordered to hold a sitting and at that sitting make the order of discharge, and that, in the meantime, one of the magistrates died, and that he happened to be one of five who were in favour of the case not going for trial; the result would be that there would be a majority in favour of the case going for trial, and we should be ordering the majority who were so in favour not to be of that opinion.

I agree as to the desirability of the court being constituted of an uneven number of justices on the rehearing. *Bagg* v. *Colquhoun* (1) is a clear authority, in a summary jurisdiction case, for the reconstitution of the court, because there two justices originally heard the case, and, being divided in opinion, decided that it would be desirable to have a rehearing by other justices, and the Court expressly approved of that course being taken. I think that the justices have the same power of directing a rehearing when they are exercising their powers under s. 25 of the Indictable Offences Act, 1848.

SANKEY J. I agree. It appears to me that the determination of the question whether this rule should be discharged or made absolute depends on the true construction of a few words in s. 25 of the Act of 1848. I read those words in this way: "If the justices shall be of opinion that the evidence is not sufficient to put such accused party on his trial such justices shall order such party to be discharged."

(1) [1904] 1 K. B. 554.

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In the present case the justices have not yet reached that point, and it is quite impossible for us to order them to arrive at a certain opinion and discharge the applicant. What then is to be done under these circumstances? I can see nothing in any of the statutes or cases which forbids the justices adjourning the hearing and reconstituting the court, and that is the proper course to pursue. In any such reconstituted tribunal it would be advisable that the number of justices should be an uneven one. I entirely refuse to discuss what will happen if the same result follows on the second hearing, except that I say I think this Court would have power to deal with the situation.

Rule discharged.

Solicitors showing cause: *Passingham & Hill, Hitchin.*
Solicitors in support: *Cooper & Co.*

W. L. L. B.

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[IN THE COURT OF APPEAL.]

CHAPLIN *v.* SMITH.

[1923. C. 3097.]

Landlord and Tenant—Lease—Covenant not to part with Possession—Permission to use—Licence—Forfeiture.

A lessee who has covenanted not to part with possession of the demised premises does not commit a breach of the covenant by merely permitting another person to have the use of the premises, so long as the lessee retains the legal possession himself.

A lessee had covenanted with his lessor that he would not assign or underlet or part with possession of the demised premises or any part thereof. He assigned his business, that of a motor garage proprietor, to a company of which he was the managing director and in which he held a controlling interest. He carried on the business of the company on the premises which were stated to be its registered address and on which the name of the company was exposed. He kept the key of the premises in his possession. The company agreed to indemnify him in respect of rates and taxes. The company appeared in the valuation list for the parish as the occupier of the premises for the purpose of the poor rate. Subsequently a second company was formed, of which the lessee was the managing director, and which took over the business, assets, and liabilities of the first company. In negotiating for this

transfer the lessee stipulated that he should remain in possession as actual tenant of the demised premises :—

Held, that no interest in the demised premises had passed to the companies or either of them, and that there had been no breach of the lessee's covenant not to part with possession of the premises or any part thereof.

Peebles v. *Crosthwaite* (1897) 13 Times L. R. 198 followed.

Jackson v. *Simons* [1923] 1 Ch. 373 approved.

Judgment of Shearman J. reversed.

APPEAL from the judgment of Shearman J.

The plaintiff claimed possession of the piece of land and appurtenances hereafter mentioned for breach of a covenant not to assign or underlet or part with possession of the premises or any part thereof contained in a lease of which the defendant was the lessee.

The facts were as follows :—

By an indenture of lease dated November 24, 1920, made in pursuance of an agreement dated August 28, 1919, Mrs. Frances Emily Chaplin, the plaintiff, let to Frederick Whiteman Smith, the defendant, for a premium of 225*l.* and at the rent hereinafter mentioned a piece of land with buildings and stabling thereon lying between Finchley Road and Avenue Road, Hampstead, numbered 99 and 100 Finchley Road and known as the Swiss Cottage Inn, for a term of fourteen years, less five days, from September 29, 1919, at the yearly rent of 450*l.* The lessee covenanted that he would not use or suffer to be used the premises or any part thereof as a shop warehouse or other place for carrying on any trade or business whatsoever otherwise than for the purpose of storing motor cars to be used by him in connection with his business and for housing motor cars to be let out by him on hire and for the purpose of storing and housing motor cars generally of carrying out ordinary running repairs and generally in the same way and for similar purposes in connection with the business of a garage proprietor as the premises had in the past mutatis mutandis been made use of in connection with the business of an innkeeper tavern-keeper or licensed victualler and that of livery and bait stables as usually carried on.

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The lessee also covenanted that he would not without the consent in writing of the lessor, which was not to be unreasonably withheld in the case of a respectable or responsible person, "assign or underlet or part with the possession or otherwise dispose of the premises or any part thereof" otherwise than by will or deed.

The lease also contained a proviso for re-entry if there should be a breach of any of the covenants on the part of the lessee therein contained.

On December 15, 1919, a private company had been registered under the name of the Hampstead and Swiss Cottage Motor Company, Limited. Its objects were, among others, to acquire or establish and carry on the business of motor engineers, garage proprietors and manufacturers; to purchase, take on lease, rent, hire, or otherwise acquire any real or personal property, and in particular any land, buildings, plant, machinery, stock in trade, patents, and any estate or interest therein.

Before the lease of November 24, 1920, was executed the defendant informed the plaintiff that he proposed to carry on the business by means of a company, and the plaintiff's solicitors wrote to the defendant saying that before consenting to any assignment or underlease to a company the plaintiff would require particulars of the scope and objects of the company.

On November 26, 1920, the defendant's solicitors wrote to the plaintiff's solicitors: "Our client Mr. Frederick Whiteman Smith desires to sublet the premises comprised in the lease dated November 24, 1920, to the Hampstead and Swiss Cottage Motor Co., Ld., whose registered office is situate at 100 Finchley Road, N.W. We enclose a print of the memorandum and articles of association for perusal and return and have to submit the following information with reference to the company. The company was incorporated on December 15, 1919, with a nominal capital of 5000*l.* divided into 2500 10 per cent. cumulative preference shares of 1*l.* each and 2500 ordinary shares of 1*l.* each. The company has issued 640 cumulative preference shares and 1754

ordinary shares for cash with the exception of 42 ordinary shares and 105 preference shares. These are fully paid up, and with regard to the latter 10*s.* per share has been paid up. The shares are now held by the following persons :—

	Ordinary shares.	Cumulative preference shares.
Mr. Frederick Whiteman Smith .	1501	—
Mr. George Forster	170	435
Mr. Douglas Ramsey	40	100
Mr. H. Jacobs	28	70
Mr. P. H. Wheeler	14	35
Mr. Calder Woods	1	—
	1754	640

" Mr. Frederick Whiteman Smith is the managing director and under art. 15 of the company he is the first director and is not subject to retirement by rotation or otherwise except voluntary resignation. The other director is Mr. George Forster above referred to. The company's bankers are the London County and Westminster Bank, Bow Street Branch.

" Our client proposes to underlease the premises for the whole of the term less the last day, and as under this transaction he will remain responsible to your client for the rent and covenants contained in the lease we think you will agree that there is no reason why the licence should be withheld." . . . .

The plaintiff declined to accede to the defendant's proposal, but made a counter proposal which however was not assented to. The defendant carried on the business of the Hampstead and Swiss Cottage Motor Co., Ld. (hereafter called the Hampstead Co.), upon the demised premises. There was no document in writing defining the interest, if any, of the company in the premises. It had its name exposed there ; No. 100 Finchley Road was given as its registered address and as its address in the telephone directory, and the company appeared in the valuation list of the parish as the occupier of the demised premises for the purpose of the poor rate. There was only one key of the premises, and the defendant

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kept it in his possession. There were two garages on the premises, and they were always kept open. The company agreed to indemnify the defendant against claims for rent, rates, and taxes.

On May 3, 1923, a private company was incorporated under the name of William Sanderson's Motor Company, Limited. The directors were one William Sanderson, and the defendant, who was the managing director. The purpose and objects of this company were: (*a*) to carry on business as motor haulage contractors, general carriers, forwarding agents, and suppliers of mechanical transport; also (*b*) as motor engineers, garage proprietors, coach builders and manufacturers, repairers and sellers of and dealers in or agents for wholesale or retail motor cars cycles lorries launches vans aeroplanes hydroplanes and other conveyances of all descriptions of mechanical transport; (*c*) to acquire and take over as a going concern and carry on the business then carried on by the Hampstead Co., together with all the assets and liabilities of that company, and with a view thereto to enter into and carry into effect an agreement between the Hampstead Co. of the first part, the defendant of the second part, and the company of the third part; (*d*) to acquire and take over as a going concern the business then carried on of William Sanderson, Ld., and the assets and liabilities thereof and with a view thereto to enter into an agreement between William Sanderson, Ld., of the first part, William Sanderson of the second part, and the company of the third part; (*f*) to purchase or by any other means acquire any freehold, leasehold, or other property.

During the negotiations for the transfer of the business and goodwill of the Hampstead Co. to William Sanderson's Motor Co. the defendant consulted his solicitor, who advised him that he could not assign the lease or underlet or part with possession of the premises. On May 30, 1923, he wrote to Mr. William Sanderson, his co-director in William Sanderson's Motor Co. and the chairman of that company: "With reference to our conversation about the Swiss Cottage premises I have discussed the matter with Mr. Calder Woods

and he advises me that the premises cannot be dealt with in any way by me as I must remain the actual tenant according to the lease. Therefore the company will only have the use of the premises as I must remain in possession all the time."

Mr. Sanderson assented, and the business of William Sanderson's Motor Co. was carried on without further agreement or variation until some months after July 16, 1923, the date of the writ.

On June 12, 1923, two deeds were executed. By the first the Hampstead Co., whose registered office was stated to be at 100 Finchley Road, Hampstead, in consideration of 100*l.* assigned the goodwill interest and connection in and concerning the trade or business of motor engineers and garage proprietors theretofore carried on by them to William Sanderson's Motor Co., Ld.; and the defendant, whose address was stated to be "100 Finchley Road aforesaid," and the Hampstead Co. covenanted that they would not for five years be directly or indirectly concerned in any business which might compete with the business of motor haulage contractors, garage proprietors, and manufacturers of motor car accessories for the time being carried on by William Sanderson's Co.

By the second deed William Sanderson, Ld., in consideration of 5*l.* assigned the goodwill interest and connection in and concerning the trade or business of motor haulage contractors as theretofore carried on by them to William Sanderson's Motor Co., Ld., and William Sanderson and William Sanderson, Ld., covenanted that they would not for five years be directly or indirectly concerned in business in competition with the business of motor haulage contractors carried on by William Sanderson's Motor Co.

Upon these facts Shearman J. gave judgment for the plaintiff on the ground that the defendant had parted with possession of the premises in breach of the covenant.

The defendant appealed.

Holman Gregory K.C. and *H. J. Rowlands* for the appellant. The learned judge was wrong in holding that the Hampstead Co.

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or William Sanderson's Co. ever were in possession of the demised premises or of any part thereof. They never were. The appellant retained possession throughout the transactions, and therefore there was no breach of this covenant: *Peebles* v. *Crosthwaite* (1), a judgment of the late Romer J. affirmed by the Court of Appeal. (2) The companies never had more than leave and licence to use the premises. To permit another to use premises is no breach of a covenant not to assign demise or part with a lease or any estate or interest therein: *Daly* v. *Edwardes* (3), affirmed in the House of Lords sub nom. *Edwardes* v. *Barrington* (4), on the ground that a licence confers no interest: *Thomas* v. *Sorrell* (5); cf. *Frank Warr & Co.* v. *London County Council.* (6) The latest case on the construction of this covenant, *Jackson* v. *Simons* (7), a judgment of the present Romer J., is to the same effect.

[*Richards* v. *Davies* (8) was also cited.]

The Hon. Sir Malcolm Macnaghten K.C. and *Morle* for the respondent. There can be no doubt that one or the other of these companies was intended to have occupation of these premises: the name and the registered address of the Hampstead Co. were there.

[SCRUTTON L.J. But was the occupation exclusive? "Generally an occupation or use which is not on the face of it exclusive is not evidence of de facto possession": Pollock and Wright on Possession, p. 35.]

They had acquired at least a licence for valuable consideration. Since *Walsh* v. *Lonsdale* (9) and *Lowe* v. *Adams* (10) a licence so acquired is irrevocable in the strict sense, that is to say its revocation gives not merely a right of action at common law for damages but a right to specific performance of the agreement and to an injunction to restrain its breach by revocation of the licence. The result is that the licensee acquires an interest in the premises: *Hurst* v. *Picture*

(1) (1896) 13 Times L. R. 37.
(2) 13 Times L. R. 198.
(3) (1900) 83 L. T. 548.
(4) (1901) 85 L. T. 650.
(5) (1674) Vaugh. 330, 351.
(6) [1904] 1 K. B. 713.
(7) [1923] 1 Ch. 373.
(8) [1921] 1 Ch. 90.
(9) (1882) 21 Ch. D. 9.
(10) [1901] 2 Ch. 598.

Theatres (1); and therefore the covenant has been broken. "A man is said to possess or to be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others": Pollock and Wright on Possession, p. 1. As soon as he has parted with the power of excluding others, he has parted with possession.

Counsel was not called on in reply.

BANKES L.J. If this were a matter of first impression I might have agreed with the judgment of Shearman J. But when the authorities are considered, it becomes clear that there has been no breach of covenant. The covenant not to "assign or underlet or part with possession" of the demised premises or any part thereof is a well known covenant in leases. The covenant in *Peebles* v. *Crosthwaite* (2) was in the same terms. I wish to emphasize the fact that from beginning to end of these transactions, from August 28, 1919, before the Hampstead Co. was formed for the purpose of carrying on the appellant's business, to the time when William Sanderson's Motor Co. was formed, and afterwards, the appellant retained the power to exercise real and effective possession of the premises. If instead of retaining possession he had gone abroad and left the management of the company and the control of the premises to some other officer of the company the Court might have been driven to a different conclusion. But here the appellant remained in possession as managing director with a controlling interest in the first company, and when the business of that company was being transferred, he was advised by a solicitor; the person with whom he was negotiating for the transfer was informed of the advice, and the result was the arrangement embodied in the letter of May 30, 1923. If the new company was ready in the circumstances to enter into an agreement for the use of the premises while the appellant remained in possession as lessee to the respondent, there is nothing in law to prevent this arrangement or give to it an effect other than that which

(1) [1915] 1 K. B. 1. (2) 13 Times L. R. 37.

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the parties intended. If so, there is no breach of the covenant. The learned judge accepts the facts; but must have held that a man cannot permit another to occupy and at the same time himself remain in possession. In my opinion it is quite possible in law to do so. I would cite first *Jackson* v. *Simons*. (1) There also the covenant was not to assign, or underlet, or part with the demised premises or any part thereof. Romer J. said (2): "If the arrangement constituted an underletting it must have conferred upon Mr. Barron some estate or interest in land, and this, in my opinion, was not the effect of the arrangement. All that was conferred upon Mr. Barron was, as it seems to me, a mere privilege or licence to use a part of the demised premises." The learned judge then refers to *Daly* v. *Edwardes* (3) and *Frank Warr & Co.* v. *London County Council* (4), and continues: "The defendant moreover retained the legal possession of the whole of the premises at all material times and, as pointed out by Romer J. in *Peebles* v. *Crosthwaite* (5), a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises." In my opinion that is a correct statement of the law. *Peebles* v. *Crosthwaite* (5) was affirmed in the Court of Appeal, and became binding not only upon Romer J., the future Lord Justice, but upon the present Romer J., his son, and upon Shearman J. also. If there is any difference between that case and this it is that this case is more in favour of the tenant, because the executors of the tenant in that case had agreed to sell the premises out and out to a company, but realizing what their position would be if they parted with possession without obtaining the landlords' licence in writing, they forbore to execute a formal assignment. Apart from the agreement to sell, the executors were in a position almost identical with that of the appellant in this case. Two of them were directors in the company and

(1) [1923] 1 Ch. 373.
(2) [1923] 1 Ch. 380.
(3) 83 L. T. 548; in H. L. *Edwardes* v. *Barrington* 85 L. T. 650.
(4) [1904] 1 K. B. 713.
(5) 13 Times L. R. 37; affirmed ibid. 198, 199.

took part in the management of its business at the demised premises which were its registered address. The Court of Appeal held that they had not parted with possession of the premises. Lindley L.J. said, in the words of the report, "that the executors had agreed to sell their testator's business, including the demised property, to a limited company, but they were advised that they should be careful what they were about or else they would forfeit the property. They were informed by their solicitor, Mr. Soames, that they should not part with possession. No doubt they let the company into possession, but they did not part with possession themselves, and so long as it was true in fact that the lessees had not parted with possession they had committed no breach of the covenant." The only thing wanting to effect a transfer of the property in that case was that the transaction should be completed by an assignment of the lease. In the present case there was no agreement to sell the demised premises. In that respect it is more favourable to the tenant. And if the true facts are, as I think they are, that the appellant and the successive companies came to terms on the basis that he neither could nor would part with possession, but would at all costs remain in possession himself and allow the company's business to be conducted on the premises while he remained in possession of them, then in my view of the authorities there was no parting with possession. The lessee of a double fronted shop with a door in the middle and a counter on either side, who has covenanted not to part with possession of the demised premises or any part thereof, may surely agree to allow a licensee to carry on a business in one part while the lessee himself remains in possession of the whole premises and carries on his own business in the other part. In that case there is no parting with possession, and I see no distinction between that case and this. In my view this case is covered by authority, and the appeal must be allowed.

WARRINGTON L.J. The only question we have to decide is whether the appellant has broken the covenant in the

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lease that he will not "part with the possession or otherwise dispose of the premises or any part thereof." On August 28, 1919, the appellant entered into an agreement for a lease containing the covenant in question. Pending actual execution of the lease he agreed to transfer to a limited company the business which he proposed to carry on upon the premises. The company was entirely controlled by the appellant. At first he proposed that the landlady should grant a lease to the company; but she objected to do this. Then he asked for leave to make an underlease to the company for the term less one day. Again the lessor objected, but suggested an assignment to the company of the whole term, the directors guaranteeing payment of the rent and performance of the covenants. To this the directors did not assent, and so there was neither an assignment nor an underlease. There was never any agreement by the appellant to assign the premises to the company. After the lease was granted the business of the company was carried on upon these premises. The appellant was its managing director. That is all that happened until May, 1923, when the company assigned the goodwill of its business to another company. This assignment made no mention of the premises. It only affected the goodwill. The appellant was the managing director of the new company. So far I see no evidence of any parting with possession; but there is a further fact to negative it. We have a record of the position taken by the appellant. On May 30, 1923, he wrote: "With reference to our conversation about the Swiss Cottage premises I have discussed the matter with Mr. Calder Woods and he advises me that the premises cannot be dealt with in any way by me as I must remain the actual tenant according to the lease. Therefore the company will only have the use of the premises as I must remain in possession all the time." The only remaining facts are that the premises appear as the registered office of one of the companies; the name of one of the companies appears on the premises; as between the appellant and the two companies they undertook to indemnify him against the rent, rates, and all the current expenses of the business

carried on at the premises, and in the valuation list for 1920 the name of the first company appeared as that of the occupier of the premises.

On these facts did the appellant part with possession of the premises? Certainly he never meant to do so. Must he nevertheless be held in law to have done so? In the absence of authority I should say that a man may abstain from parting with possession of premises although he allows another to use them, and that then he does not commit a breach of this covenant. In the circumstances of this case seeing that the appellant remained in control of each of the companies the facts show that he was really and truly carrying on the business of others on his own premises which remained his from first to last. If so, he never parted with possession of them. But even if we must regard the companies as carrying on their own businesses by being allowed to use the premises, the case is then covered by the authorities cited by Bankes L.J. In *Peebles* v. *Crosthwaite* (1) the facts pointed more clearly to a parting with possession. Something more had been done than the appellant in this case has done; the lessee had covenanted not to part with possession, and his executors had sold the premises with the business to a company; the stock was delivered to the company which had put up its name on the premises, and the premises were given as the registered office of the company. The executors, or some of them, were directors of the company; but the property was not assigned to them. These being the facts of the case, the judgment of Romer J. is reported thus: "In his judgment, however, the lessee's executors had not parted with possession; they had never gone out of possession. Possession had been retained, for one reason because it was desired that no breach of covenant should be committed"—that was the same in this case—"and also because the purchase by the company was not fully completed; and it was not desired that while the action was pending the rights of the parties should be interfered with. The executors were still in possession. The legal

(1) 13 Times L. R. 37, 38, 198, C. A.

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possession was still theirs, although pending completion and the obtaining of a licence to assign they had allowed the company to use the premises for the purposes of the company. Doing so was not a breach of this covenant. If a lessee retained possession he did not commit a breach of such a covenant by allowing other people to use the premises. And his Lordship did not see why he should, for the purpose of creating a forfeiture, hold that persons had given up possession in such a case when it was clearly contrary to their intention to do so." That judgment was affirmed in the Court of Appeal. (1) It seems to me to cover this case completely. The recent case of *Jackson* v. *Simons* (2) is to the same effect. There the covenant was against assigning, underletting, parting with the premises or any part thereof or parting with or sharing the possession or occupation thereof or of any part thereof. The lessee in consideration of a weekly payment agreed to allow the proprietor of a night club to use part of the premises for the sale of tickets every night between the hours of 10.30 P.M. and 2 A.M. The lessee admitted a breach of the covenant not to share occupation of part of the premises, but contended successfully that there had been no parting with possession or occupation of the premises or of any part thereof. In country villages it is common to find the occupier of a house permitting a bank to use one of the rooms on certain days in the week. It could hardly be said that in so doing he has parted with possession of the house or any part of it. I see no material distinction between that case and the present. I agree that the appeal should be allowed.

SCRUTTON L.J. I agree. The respondent here is claiming possession on a forfeiture. In these cases the Court relaxes somewhat its usual upright attitude and leans away from the forfeiture. This explains many of the decisions. The learned judge seems to have proceeded thus: He found the company in occupation; he treated it as being in exclusive occupation and therefore in possession, and concluded that the

(1) 13 Times L. R. 198. (2) [1923] 1 Ch. 373.

lessee must have parted with possession and so incurred a forfeiture. The flaw in this reasoning is that the occupation was merely that of a licensee. Such an occupation is not necessarily exclusive. In truth there was no evidence of exclusive occupation, and so no evidence of possession by the company; and if in law the lessee did not part with possession there was no breach of the covenant. In my opinion the following passage from Foà on Landlord and Tenant, 6th ed. (1924), p. 323, is a correct statement of the law: "The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of the covenant." The attitude of the appellant in this matter is clearly shown by his letter of May 30, 1923. [The Lord Justice read the letter as set out above, and proceeded:] That was no colourable document; it is the expression of his real intention. He did not assign, nor did he underlet. He was constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them. In these circumstances the authorities bind us to say that he has not parted with possession of the premises or any part thereof.

Appeal allowed.

Solicitors for appellant: *Calder Woods & Sandiford.*
Solicitors for respondent: *Robin Hamp & Green.*

W. H. G.

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Nov. 19.

GUARDIANS OF THE POOR OF BARTON-UPON-IRWELL UNION, APPELLANTS *v.* GUARDIANS OF THE POOR OF WYCOMBE UNION, RESPONDENTS.(1)

Poor Law—Settlement and Removal—Irremovability—Illegitimate Child—Marriage of Mother—Poor Removal Act, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1 *—Poor Removal Act*, 1848 (11 *&* 12 *Vict. c.* 111)*—Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

In 1909 an illegitimate child of three and a-half years of age went to live in a parish in the Barton-upon-Irwell union, and there resided until 1920. Her mother married in 1909, and from 1913 until the date of these proceedings continuously resided with her husband in a parish in the Wycombe union in such circumstances as to acquire a settlement there under the Divided Parishes and Poor Law Amendment Act, 1876, s. 34:—

Held, that after her mother's marriage the child ceased to have the mother's settlement, and had herself acquired a settlement by residence in the Barton-upon-Irwell union.

CASE stated by Buckinghamshire quarter sessions.

On December 5, 1924, an order was made by justices for the county of Buckingham that the place of the last legal settlement of one Louise Brant, aged nineteen years, a single woman, and her infant child, then chargeable to the Wycombe Union, was in the parish of Worsley, in the Barton-upon-Irwell Union, and that she and her infant child be removed from the Wycombe Union to the Barton-upon-Irwell Union. From this order the Barton-upon-Irwell Union appealed to the Buckinghamshire quarter sessions.

The facts and arguments before this Court as shown in the case stated were as follows: Louise Brant was the illegitimate child of one Margaret Baxter (formerly Brant), and was born on September 25, 1905, at Clapham Maternity Hospital, 41 Jeffreys Road, Lambeth, in the county of London. Margaret Baxter (then Brant) was a spinster when Louise Brant was born. Louise Brant had no other settlement than that of her mother before March, 1909. On March 17, 1909, Margaret Brant married Ernest Baxter, with whom she resided at various places until December, 1913. From December, 1913, until the date of the justices'

(1) Reversed in C. A. February 11, 1926.

order, Ernest and Margaret Baxter resided continuously in the parish of Chepping Wycombe in the Wycombe Union in such manner and under such circumstances as to acquire a settlement in that parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876. In February, 1909, Louise Brant went to reside at Walkden in the parish of Worsley in the Barton-upon-Irwell Union with one George Pennington and his wife, and Louise Brant thereafter resided in the parish of Worsley without relief or interruption until June, 1920. Neither Ernest Baxter nor Margaret Baxter (formerly Brant) had ever resided in the parish of Worsley. From June, 1920, until October 22, 1924, Louise Brant resided in various places without acquiring a settlement, and on the latter date she and her infant became chargeable to the guardians of the Wycombe Union. Louise Brant and her infant child had the same settlement.

The guardians of the Barton-upon-Irwell Union contended that Louise Brant at no time resided in the parish of Worsley in such manner and/or under such circumstances as would, in accordance with the statutes in that behalf, render her irremovable, and that by reason of the premises Louise Brant, otherwise Baxter, was at all times incapable of acquiring the settlement relied upon in support of the order of justices.

The guardians of the Wycombe Union contended that from and after the date of her mother's marriage in March, 1909, Louise Brant was capable of acquiring and did acquire a settlement by reason of her above stated residence in the parish of Worsley, and that the order of justices was rightly made.

The Court of quarter sessions were of opinion, having regard to the decision in *Hollingbourn Union* v. *West Ham Union* (1) and the speech of Lord Macnaghten in *West Ham Union* v. *Holbeach Union* (2), that the contention of the appellants was correct, and they therefore allowed the appeal. They stated this case for the opinion of the Court.

(1) (1881) 6 Q. B. D. 580. (2) [1905] A. C. 450, 452.

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Herbert Davey for the Wycombe Union cited *Lexden and Winstree Union* v. *Windsor Union* (1); *Tendring Union* v. *Braintree Union* (2); *Fulham Union* v. *Woolwich Union.* (3)

H. M. Paul for the Barton Union cited *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (4); *West Ham Union* v. *Holbeach Union* (5); *Braintree Union* v. *Rochford Union* (6); *Reg.* v. *St. Mary's, Newington* (7); *Reigate Union* v. *Croydon Union.* (8)

The arguments sufficiently appear from the judgments.

LORD HEWART C.J. [after alluding to the facts in the case stated continued:] Such is the history involved in this case, and the important facts which emerge are these: that the illegitimate child in February, 1909, or thereabouts, at a time when she was three and a-half years of age, went to live in the Barton-upon-Irwell Union, and there lived until June, 1920, while her mother, in March, 1909, married, and never at all lived in the Barton Union. The contest was whether it was true to say that the illegitimate child had acquired a settlement in the Barton Union. On the part of the guardians of the Wycombe Union it was urged that she had; on the part of the guardians of the Barton-upon-Irwell Union it was urged that she had not. They did not indeed undertake to say where her settlement was; they founded themselves upon the negative proposition that at any rate it was not in the Barton-upon-Irwell Union.

Now, what was the ground which they put forward in support of that contention? By the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, it is provided: "That from and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years"—this period was afterwards reduced to three years, and ultimately to one year—"next before the application for the warrant." The section originally

(1) [1921] 2 K. B. 143.
(2) [1920] 2 K. B. 647.
(3) [1907] A. C. 255.
(4) [1894] A. C. 230.
(5) [1905] A. C. 450.
(6) (1911) 106 L. T. 569.
(7) (1843) 4 Q. B. 581.
(8) (1889) 14 App. Cas. 465.

concluded with a proviso in these terms: "Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable." But by the Poor Removal Act, 1848 (11 & 12 Vict. c. 111), that proviso was repealed, and instead of it the following proviso was enacted: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act"—that is to say the Act of 1846—"and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." The case for the Barton Union depended upon those words. It was contended, and successfully contended on behalf of that union on appeal to quarter sessions, that the mother of this illegitimate child was a person who had a child having no other settlement than her own. The importance of that contention consists in this, that under the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise"; and under s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." The second clause or paragraph of that section provides as follows: "An illegitimate child

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shall retain the settlement of its mother until such child acquires another settlement." Finally the third paragraph of that section provides that: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

Under those statutory provisions it was urged by the Barton-upon-Irwell Union that this child at all material times had no other settlement than the settlement of the mother, and the question was whether upon the facts of the case rightly considered in relation to the law, that was true. The argument was that the illegitimate child took and retained the settlement of the mother, and that there never came a moment when that proposition ceased to be true. It was admitted that she did not live in the same place with her mother after the age of three and a-half years, and that she lived continuously from the early part of 1909 until 1920 in the Barton-upon-Irwell Union. But it was said that she had the settlement of her mother, and therefore she did not live in that union in such a manner and in such circumstances as to be able to acquire a settlement there.

The principles which are applicable to such a case are reasonably clear from the decided cases. A certain complication undoubtedly arises in the consideration of them from the very different facts to which they relate, but in view (for example) of the decisions in *West Ham Union* v. *Holbeach Union* (1); *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (2); *Braintree Union* v. *Rochford Union* (3), and other authorities cited there cannot be much doubt as to the principles which are applicable.

The question here is whether this illegitimate child acquired a settlement other than the settlement of her mother. This

(1) [1905] A. C. 450. (2) [1894] A. C. 230.
(3) 106 L. T. 569.

case is upon its facts differentiated from other cases by this crucial circumstance, that on March 17, 1909, Margaret Brant, the mother, married Ernest Edward Baxter. What, then, was the position? Before that marriage, by reason of the Divided Parishes and Poor Law Amendment Act, 1876, s. 35, the illegitimate child retained the settlement of the mother. But did the illegitimate child continue to retain that settlement after the marriage of the mother? In my opinion, the answer to that question is, "No," and for this reason. The settlement which the illegitimate child had by reason of the relationship between the child and the mother was a settlement derived from the mother. But when the mother married, the mother in her turn derived a settlement from her husband. If, therefore, the illegitimate child after that event were to retain the settlement of the mother, she would be deriving a settlement from a settlement which itself was derivative. In these circumstances, as it seems to me, the final clause of the Divided Parishes and Poor Law Amendment Act, 1876, s. 35, applies: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." The effect, therefore, was that, after the marriage of the mother, the child was deemed to be settled in the parish in which she was born —namely, Clapham. Those events having happened, the child came to be in a position to acquire a settlement for herself, and by her residence in the circumstances in which that residence arose and continued in the Barton-upon-Irwell Union, from an early day in 1909 till a day near the end of 1920, it seems to me clear upon the facts that the child did acquire a settlement in the Barton Union.

The whole foundation of Mr. Paul's able and interesting argument is to be found in these words in the Poor Removal Act, 1848: "A person having a child that has no other

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settlement than her own." Once it appears that the child could and did acquire a settlement other than the settlement of the mother, that provision has no application. It is said on the part of the Barton-upon-Irwell Union that the marriage of the mother made no difference at all. If that were true, no doubt it would follow that the illegitimate child continued to have the settlement of the mother. But I cannot follow the argument that that is so when I look at the clear words of the final paragraph of s. 35 of the Act of 1876. Mr. Paul ingeniously endeavours to surmount that obstacle by saying that one ought not really to look into the condition of affairs at the time which is there referred to, because, in fact, the inquiry did not arise at that time, and it is not material now to consider what would have been the result if the inquiry had then arisen. That argument seems to me to involve this proposition, that in tracing the history of this illegitimate child for the purposes of this branch of the law, one has deliberately to leave a large lacuna, while if that lacuna be not left and the history is traced completely and continuously, a totally different result appears. The conclusion to which I have come, looking at the words of these sections and looking at the principles laid down in the many cases to which we have been referred, is that after the marriage of the mother the illegitimate child ceased to have the mother's settlement, for the reason that otherwise she would have been deriving a settlement from a derived settlement; and therefore that from that time forward her settlement was deemed to be in the parish of her birth, and she was in a position to acquire a settlement for herself. That, I think, she did acquire by her residence in the circumstances in which she resided in the Barton-upon-Irwell Union.

For these reasons I have come to the conclusion that the decision of the Court of quarter sessions was wrong and that the respondents' appeal ought to be allowed.

AVORY J. I am of the same opinion, and I hesitate to add anything to the exhaustive and lucid judgment which my Lord has just delivered.

This order, made on December 5, 1924, adjudging that the pauper was settled in the parish of Worsley in the Barton-upon-Irwell Union, was set aside by the Court of quarter sessions. I have not been able to satisfy myself at all from the case stated, or from the arguments of counsel, as to the actual reasons which led the Court of quarter sessions to reverse that order. The question was whether the pauper had by residence for three years within the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34, acquired a settlement in this Barton-upon-Irwell Union. Being an illegitimate child, it had the settlement of its mother up to the time when she married in March, 1909. For the reasons given by my Lord, which I need not repeat, as soon as that event took place, the child lost the settlement of its mother and was relegated to its birth settlement. The question then is: From that date onwards was the child, the pauper, in a position to acquire a settlement by residence within the meaning of s. 34 of the Act of 1876?

Now the decision of the House of Lords in the case of *West Ham Union* v. *Holbeach Union* (1) shows clearly that a child under sixteen may acquire a settlement by residence within the meaning of that section. Although it is true that Lord Macnaghten based his opinion upon another ground in addition to that which had been expressed by Lord Halsbury (the Lord Chancellor), the decision of the House clearly is that a child under sixteen can acquire a settlement by residence within the meaning of s. 34. It is true that in that case the child was residing with its mother during the time when it was alleged to have acquired that settlement, and, therefore, the point which arises in this case under the Poor Removal Act, 1848, did not arise in that case. The whole question here turns upon whether the proviso in the Poor Removal Act, 1848, applies in this case. It is said by the respondents that if the question whether the pauper was removable had arisen between 1909 and 1920, when she was residing in the parish of Worsley, the pauper would have been removable, because her mother would have been removable.

(1) [1905] A. C. 450.

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Undoubtedly, the decision of the House of Lords in *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (1), shows that that statute of 1848 is to be construed in this way, that is to say, one must assume for the purpose of the inquiry that the mother is residing in the parish or union in which the child is residing, and if the mother had been residing there, one must inquire whether she would have been removable. If one comes to the conclusion that the mother would have been removable, then one must conclude that the child also would have been removable. But before entering upon that inquiry whether this proviso of the Act of 1848 has any application, one must assume that the pauper child has no settlement of its own, because the proviso only applies to the case where the child has no settlement of its own; and once it is established that the child has a settlement of its own, then no question arises under this proviso. This child had a settlement of its own as soon as its mother married, and having a settlement of its own and residing as it did for more than three years from 1909 to 1920 in the Barton-upon-Irwell Union, in my opinion it was irremovable during that period from that parish, and consequently it acquired the settlement by residence within the meaning of s. 34.

For these reasons I agree that the original order of the justices was right, that the order of the Court of quarter sessions was wrong, and that the appeal of the respondents from that order ought to be allowed.

SANKEY J. I agree. I also hesitate to say anything after the judgment given by my Lord in this case, and do so only because of the very clear and lucid argument which has been addressed to us by Mr. Paul.

I found my decision upon one case and one section. The case is *West Ham Union* v. *Holbeach Union* (2), which has already been referred to. The argument on behalf of the appellants in that case was that the word "person" in the Divided Parishes Act, 1876, s. 34, meant only a person sui

(1) [1894] A. C. 230. (2) [1905] A. C. 450.

juris, and that by that Act it was not intended that an unemancipated child should acquire a settlement by residence with its mother. It was contended that s. 35 of the Act fixes the age of emancipation at sixteen, and until that age is reached a child retains the settlement of its parent and cannot acquire a settlement for itself by residence under s. 34. Now, that argument was rejected, and it is not for me to express any opinion about it, inasmuch as it was a decision of the House of Lords; but it may be remarked that the Lord Chancellor said that if the matter were res integra he would be inclined to favour the argument, while Lord Macnaghten was evidently of the same mind, because he says: "In the result of that opinion (that is the opinion given by the Lord Chancellor) I agree. But I was much impressed by the argument of counsel as to the difficulties that may arise if it be held that an unemancipated child can acquire a settlement by residence, no part of which is after emancipation." That being the law, which cannot be now questioned and is not in dispute, I turn, after looking at the Divided Parishes and Poor Law Amendment Act, 1876, s. 34, to s. 35 of the Act, which provides by the second limb that "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement," while the third limb contains the clause with regard to the derivative settlement which has been already read by my Lord.

That brings me to the argument which was addressed to us for the Barton Union—namely, that this case depends upon the construction of certain words in the Poor Law Removal Act, 1848: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act." It was said that the child in question, the pauper, would always have been removable from the parish of Worsley in the

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Barton Union, because her mother was always removable from such parish. That may be the proper result of the section, if it fits in with the facts. Mr. Paul urged that the intention of the Legislature was by this legislation to prevent mother and child from being separated. I hesitate to speculate upon the intention of the Legislature, but if that is so, the intention was only to prevent them from being separated by the authorities, and it seems to me that the section does not apply to a case where there is in fact already a separation; before the section can come into operation at all a condition precedent has to be complied with, which depends upon the facts. If the child has no other settlement than that of the mother, the section applies, and Mr. Paul's reasoning would be right. But before the section can apply at all, the condition precedent must be satisfied; it must be a case where the child has no other settlement of its own. Now for the reasons given by my Lord I think that this was a case where, having regard to the marriage of the mother, the child had another settlement, and that being so, the condition precedent to the application of the section is not complied with. Mr. Paul's argument on the meaning of the section was a proper one, but he fails in limine, for we are not here called upon to construe the section until we have seen whether this is a case in which the section comes into operation at all. For the reasons given by my Lord I am of opinion that it is not a case where the section comes into operation, and I agree that the respondents' appeal should be allowed.

Respondents' appeal allowed.

Solicitors for the appellants: *Ward & Melliar Smith, for Reynolds & Son, High Wycombe.*

Solicitors for the respondents: *Reid, Sharman & Co., for Foyster, Waddington & Morgan, Manchester.*

F. P. F.

[IN THE COURT OF APPEAL.]

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1925
[Nov. 19, 20.

LAURIE AND MOREWOOD *v.* DUDIN AND SONS.

Sale of Goods—Sale of Portion of larger Quantity held by Warehouseman—Creation of Tenancy in Common—Delivery Order for unsevered Portion of Bulk—Receipt of Order by Warehousemen—Estoppel—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 16.

The defendants, warehousemen, held 618 quarters of maize belonging to A., who sold 200 quarters thereof to W., who sold them to the plaintiffs, giving to the latter a delivery order which they lodged with the defendants. The defendants did not object to the order, nor did they make any acknowledgment to the plaintiffs of their title. Shortly afterwards, before any appropriation of the 200 quarters had taken place, A., as unpaid vendor, put a stop on delivery. In an action of detinue against the warehousemen:—

Held, that the mere giving of the delivery order by the vendor and the handing of it to the defendants by the plaintiffs was not sufficient without more to pass the property in the 200 quarters to the plaintiffs before severance from the bulk.

Since the Sale of Goods Act, 1893, *Whitehouse* v. *Frost* (1810) 12 East, 614 is not good law, if indeed it ever was.

Held, further, that the mere receipt of the delivery order by the defendants without objection did not estop them from denying that the plaintiffs were the owners of the 200 quarters.

Judgment of Sankey J. affirmed.

Appeal from Sankey J. reported [1925] 2 K. B. 383.

The plaintiffs' claim was for a declaration that they were entitled to the possession of 200 quarters of maize then held by the defendants, and that the defendants were bound to give delivery in accordance with the plaintiffs' orders. Alternatively they claimed the value of the maize and damages for its detention. The defendants denied that any property in the maize had ever passed to the plaintiffs.

The defendants are warehousemen and wharfingers, and on February 2, 1925, Messrs. J. T. Alcock & Sons had lying at the defendants' wharf 618 quarters of Plate maize, ex ss. *Harperley*, in bulk. On that day Messrs. Alcock sold to John Wilkes & Son 200 quarters of that maize "terms net cash," and gave the following delivery order to Wilkes: "Please deliver to Messrs. John Wilkes & Son 200 quarters of maize ex ss. *Harperley*." That order was indorsed by Wilkes: "Please hold against our sub-orders." The order

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was on February 21 taken by a messenger to the defendants' wharf and handed to a clerk, who took it in, but said nothing. The clerk entered the fact of the receipt of the delivery order in the defendants' books, but the plaintiffs were not informed that that entry had been made. The entry contained no mention of the indorsement. In the meantime on February 18 Wilkes, who were largely indebted to the plaintiffs, had sold the 200 quarters to them on a month's credit, and gave them a delivery order: "Deliver to Messrs. Laurie & Morewood 200 quarters Plate maize, weighed 480 lbs. All charges and risk to buyers after February 22, 1925." That order was also sent by a messenger and handed to the defendants, no comment being made by the clerk who received it. In the case of this order no entry of its receipt was made in the defendants' books. On February 25 the plaintiffs wrote to the defendants for a warrant for the maize which they had bought. Before that letter reached the defendants Messrs. Alcock, who had sold for net cash, but had not been paid, sent a stop order to the defendants instructing them to stop delivery. The defendants accordingly refused to give delivery to the plaintiffs and the present action was brought. The plaintiffs claimed: (1.) That the goods were their property upon the grounds (*a*) that immediately upon the sale to them they became tenants in common of the whole mass of grain lying at the defendants' warehouse with a right to give instructions for the delivery of the proportion covered by their contract, or (*b*) that at all events the property passed by reason of the fact that they had a delivery order for the goods. (2.) That the defendants who received the delivery order without objection were thereby estopped from alleging that the plaintiffs were not the owners. (3.) That by a custom of the trade as formulated in a letter from the plaintiffs' solicitors: "If the delivery order is sent through the post or by messenger, the person in whose favour it is issued is entitled to assume that the wharfinger will hold and deliver the particular quantity to that person's sub-order, unless the wharfinger forthwith, i.e., within twenty-four hours, either returns the delivery order or in any other way intimates

that he cannot accept it. It is not the practice to separate the quantity mentioned in each delivery order." Sankey J. upon the evidence before him found that the alleged custom was not proved, and upon the other contentions decided against the plaintiffs. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

A. T. Miller K.C., *Le Quesne K.C.* and *Trapnell* for the appellants. The fact that the 200 quarters were not separated from the rest of the 618 out of which they were to come is no objection to the plaintiffs suing in detinue. The effect of the contracts of sale by Alcock to Wilkes and Wilkes to the plaintiffs was to constitute the latter tenants in common with Messrs. Alcock of the whole bulk, and the plaintiffs were entitled to sue in respect of their interest. But even if that is not so, the fact that here a delivery order was given for the 200 quarters was sufficient to pass the property; it amounted to a symbolical delivery. Where a vendor sells a portion of a specific bulk, as distinguished from goods wholly unascertained, and gives a delivery order upon the warehouseman who has the custody of the bulk for the portion of the bulk so sold, if the warehouseman accepts the order without objection and nothing remains to be done by the vendor to complete the sale, the property in the goods sold passes to the purchaser before severance from the bulk. In *Whitehouse* v. *Frost* (1) Messrs. Dutton & Bancroft, the owners of forty tons of oil in a particular cistern, sold ten tons of it to Frost, who sold the same to Townsend and gave him a delivery order on Dutton & Bancroft, which he lodged with them. Townsend gave Frost a bill at four months for the oil, but before payment of it became bankrupt. The plaintiffs, his assignees, demanded the ten tons, which Dutton & Bancroft refused to deliver. It was held that the property in the oil had passed to Townsend, and the plaintiffs were entitled to recover. It is submitted that that is still good law in cases in which the facts are similar, repeated disapproval of it notwithstanding. But

(1) 12 East, 614.

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to bring a case within the principle of *Whitehouse* v. *Frost* (1) it must satisfy two conditions: In the first place the goods sold must be part of a specific bulk, as they are in the present case, and on this ground *Austen* v. *Craven* (2) and *White* v. *Wilks* (3) are distinguishable. In the former the defendants sold fifty hogsheads of sugar f.o.b. a British ship to K., who resold to the plaintiff by the same description. The defendants assented to the resale, but as the sugar had not been weighed or delivered it was held that the plaintiffs could not bring trover for it. But there there was nothing to identify the sugar. Sugar shipped on board any British ship would have satisfied the contract. *White* v. *Wilks* (3) is also distinguishable on the same ground. The sale there was of twenty tons of oil out of a merchant's stock "lying in several different cisterns, at different warehouses; no particular cistern or warehouse was mentioned to the buyers as that from which the oil sold to the bankrupts was to be taken, nor did the broker know where the particular oil lay which was to satisfy this contract." In the next place nothing must remain to be done by the vendor to complete the sale. On this ground *Busk* v. *Davis* (4) is distinguishable. There the sale was of ten tons of flax lying in mats at the defendants' wharf at so much a ton, but as the mats were of unequal weight it could not be determined beforehand how many mats would be required or whether a mat would not have to be divided to make up the exact weight, and as that division would be a matter to be dealt with by the vendor and not the wharfinger the property did not pass until flax had been weighed and appropriated to the contract. Lord Ellenborough said: "If the weight did not divide itself in an integral manner, it would be necessary to break up and take some fraction of another mat. Every component part therefore was uncertain; it was uncertain how many gross mats there would be, or what fraction of a broken mat." And it was on this ground that Bayley J. there distinguished *Whitehouse* v. *Frost*. (1) He said: "In the case of *Whitehouse* v. *Frost* (1) nothing remained

(1) 12 East, 614.
(2) (1812) 4 Taunt. 644.
(3) (1813) 5 Taunt. 176.
(4) (1814) 2 M. & S. 397, 402, 405.

to be done by the seller, and on that ground the decision of that case was founded." *Rugg* v. *Minett* (1) is also distinguishable on the same ground, for there the sale was of turpentine in casks to be filled by the vendor. In the present case nothing remained to be done by the vendors.

But even if no property in fact passed to the plaintiffs the defendants are under the circumstances estopped from denying that it passed. The delivery order was handed to them and they raised no objection to it. By their silence they led the plaintiffs to believe that they held the 200 quarters on their behalf. If they intended to dispute that they ought to have told them so before they altered their position by refraining from pressing for payment of the debt due to them from their vendors. In *Gillett* v. *Hill* (2) a miller sold twenty sacks of flour to the plaintiff and gave him a delivery order on the defendant, a wharfinger. On the plaintiff presenting the order the defendant said he had only five sacks to spare. The plaintiff went away, but returned with a second delivery order "to deliver 5 sacks ex 20," whereupon the defendant delivered that quantity. Subsequently the plaintiff applied for delivery of the balance, but was refused. On trover for fifteen sacks the jury found that delivery of the five sacks under the second order was an acceptance generally of the order to deliver twenty. It was held that trover was maintainable, the acceptance of the order being an admission that the defendants had twenty specific sacks of the miller in their possession, and that the property in them had passed to the plaintiff. In *Woodley* v. *Coventry* (3) the defendants sold 348 barrels of flour out of a larger quantity in their warehouse to C., who sold that quantity to the plaintiffs and gave them a delivery order for it on the defendants. On presentation of the order the defendants' warehouseman said, "It is all right," and gave samples to the plaintiffs, who thereupon advanced money to C. No appropriation was made to the contract out of the bulk. C. became bankrupt, and the defendants, being unpaid, refused delivery.

(1) (1809) 11 East, 210. (2) (1834) 2 Cr. & M. 530.
(3) (1863) 2 H. & C. 164.

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The plaintiffs brought trover. It was held that the defendants were estopped from disputing that, whether as between the vendor and purchaser the property had passed or not, they held the specified amount at the plaintiffs' disposal. *Knights* v. *Wiffen* (1) is to the same effect. There the defendant sold eighty quarters of barley to M. out of a larger quantity in his granary adjoining a railway station. No appropriation to the contract was made. M. sold sixty quarters of it to the plaintiff, who paid him, and gave a delivery order, on receipt of which the defendant said: "All right, I will put the barley on the line." M. became bankrupt, and the defendant as unpaid vendor refused to deliver. It was held that the defendant was estopped from denying that he had appropriated sixty quarters to the plaintiff's purchaser and that the property had passed, the plaintiff having altered his position by abstaining from demanding his money back from M. Moreover here the defendants, on receipt of Messrs. Alcock's delivery order, entered the name of Wilkes in their books as the person to whom the maize was to be delivered. As towards Wilkes they were thereby estopped from disputing Wilkes' title, on the authority of *Harman* v. *Anderson*. (2) There the owner of certain casks of butter lying in the defendant's warehouse sold them to one Dudley, and gave him a delivery order, which he lodged with the defendants, who transferred the goods into his name in their books and debited him with the rent. Dudley became bankrupt, and his assignee brought trover. It was held that the defendants were estopped from disputing an attornment to the purchaser, and that it was too late to stop the goods in transitu. Lord Ellenborough said: "The payment of rent in these cases is a circumstance to show on whose account the goods are held; but it is immaterial here, the transfer in the books being of itself decisive." Then if the defendants would be estopped as towards Wilkes, the plaintiffs, as Wilkes' purchasers, are entitled to the benefit of that estoppel.

S. L. Porter K.C. and *Werninck* for the respondents were not called on.

(1) (1870) L. R. 5 Q. B. 660.

(2) (1809) 2 Camp. 243, 245.

BANKES L.J. This is an appeal from a judgment of Sankey J. upon the following facts: Alcock & Sons were on February 2, 1925, the owners of 618 quarters of maize ex ss. *Harperley*, then lying in the defendants' warehouse, and on that date they sold 200 quarters to Wilkes & Son, giving them a delivery order addressed to the defendants in this form: "Please deliver to bearer for Messrs. John Wilkes & Son 200 quarters of maize ex ss. *Harperley*." That order was indorsed by Wilkes: "Please hold against our sub-orders." That delivery order was lodged with the defendants, who said nothing to the messenger by whom it was sent, but made an entry in their books acknowledging the receipt of it. On February 18 Wilkes & Son sold 200 quarters of maize to the plaintiffs and gave them a delivery order on the defendants, "Deliver to Messrs. Laurie & Morewood 200 quarters Plate maize ex delivery order lodged." That order also was handed to the defendants, who said nothing with respect to the receipt of it, and made no entry in their books about it. The plaintiffs applied to the defendants on February 25 for a warrant, but before a warrant was issued Messrs. Alcock had put a stop on the delivery, and the defendants thereupon refused to deliver any maize to the plaintiffs. It was under these circumstances that the action was brought.

One contention for the plaintiffs was that they were entitled to delivery of the maize by a custom of the trade, whereby it was alleged that if a warehouseman had a delivery order lodged with him, and within twenty-four hours thereafter did not receive any notice of a stop upon the delivery, the person to whom the order made the goods deliverable became absolutely entitled to the delivery, and it was then too late for the person who issued the order to endeavour to stop the goods. A number of witnesses were called in support of that contention, but the learned judge found that the evidence fell short of what was necessary to establish a custom, and I agree with that view.

A second contention was that by reason of the mere receipt by the defendants of the delivery order given by

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Wilkes to the plaintiffs they were estopped from denying that they held 200 quarters of maize at the disposal of the plaintiffs, notwithstanding that they made no acknowledgment to the plaintiffs of that receipt, or any statement that they would act upon it. On that point two cases were cited to us, *Woodley* v. *Coventry* (1) and *Knights* v. *Wiffen* (2), in both of which an order was presented to a warehouseman and accepted, in the sense that an intimation was given to the person presenting it that goods of the quantity specified in the order were being held by the warehouseman at his disposal, and it was held that if he acted on that representation the warehouseman was estopped from disputing the truth of his statement. I should like to cite one sentence from the judgment of Bramwell B. in the former case as illustrating the principle. There the defendants sold 348 barrels of flour out of a larger quantity in their warehouse to one Clarke, who sold that quantity to the plaintiffs and gave a delivery order on the defendants. Bramwell B. said (3): "When the delivery order was presented to the defendants, they might have said, 'We will not accept this order, for there are not 348 barrels of flour in our warehouse of which Clarke has a right to dispose. There is a much larger quantity in the warehouse out of which Clarke has a right to 348 when selected and appropriated to him, but, until that is done, he has no right to any, for they are not his.' But instead of saying that, the defendants in effect say, 'We recognize a right in Clarke to dispose of 348 barrels,' which could only be upon the supposition that the property in 348 barrels had passed to him." But there was no such acceptance of the delivery order in the present case. It was handed in to the defendants, and that was all. It is true that an entry of the receipt of the first delivery order was made in the defendants' books, but the fact of that entry was not communicated to the plaintiffs, and in the case of the plaintiffs' delivery order no entry at all was made in the books. If the plaintiffs could have established the custom above referred to they would

(1) 2 H. & C. 164. (2) L. R. 5 Q. B. 660.
(3) 2 H. & C. 172.

have been entitled to say, "It is true that we have received no acceptance of the delivery order in fact from the defendants, but their silence on the subject amounts after the expiry of a reasonable time to acceptance by reason of the custom." But, as I have said, the custom was not proved, and the plaintiffs are driven to contend that the mere receipt of the delivery order, without any acknowledgment or acceptance, is sufficient to raise an estoppel. It has been argued by Mr. Le Quesne that it is sufficient, and he has referred to two cases in support of that proposition. One is *Gillett* v. *Hill* (1) and the other is *Harman* v. *Anderson*. (2) For myself I think that *Gillett* v. *Hill* (1) is no authority for the proposition, for there the jury found that the delivery order had been accepted and that the acceptance had been communicated to the plaintiff. There were in that case two delivery orders, the first one being for twenty sacks of flour. On presentment of the order the defendant was unable to comply with it, as he had only five sacks to spare, but he took the order and filed it. On a second order being presented for "5 sacks ex 20" the defendant delivered the five sacks. The Court held that on those facts there was evidence on which the jury could find that the delivery of the five sacks in compliance with the second order was an acceptance generally of the order to deliver twenty sacks. With regard to *Harman* v. *Anderson* (2) it is difficult to explain Lord Ellenborough's statement as to "the transfer in the books being itself decisive" except upon the assumption that the 600 casks of butter for which trover was there brought were specific casks. Although the report does not say so I assume that they were specific, and if so the case is distinguishable from the present, where the goods are unascertained. I do not think, therefore, that either of those cases is an authority for the proposition that an estoppel can arise where all that has happened is that the delivery order has been received by the warehouseman without any comment. That disposes of the second point.

Then Mr. Le Quesne took a third point, that, even

(1) 2 Cr. & M. 530. (2) 2 Camp. 243.

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assuming what happened did not create an estoppel, the mere giving of a delivery order amounted to a symbolical delivery of the goods by the vendor and was sufficient to pass the property even before they were severed from the larger quantity of which they formed part. And for that he relies on the authority of *Whitehouse* v. *Frost*. (1) But that is a case which has been adversely commented on so generally and on so many occasions that it cannot now be regarded as law. It is enough to refer to two of the cases in which it was cited: *Austen* v. *Craven* (2) and *White* v. *Wilks*. (3) In the latter of those cases the headnote is, "By a bargain and sale of twenty tons of oil out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns in divers places, no property passes; there must be a separation of the part sold from the rest of the stock." *Whitehouse* v. *Frost* (1) was there relied on by the plaintiff, and Mansfield C.J., in delivering judgment, said that *Austin* v. *Craven* (2), where it was held that trover could not be maintained by a purchaser of fifty hogsheads of sugar before they had been specifically separated from the vendor's stock, was decided "in direct opposition to the cases cited," the main one of which was *Whitehouse* v. *Frost*. (1) He refused to accept *Whitehouse* v. *Frost* (1) as an authority for the proposition that the mere giving of a delivery order passes the property in the goods sold before severance from the bulk, or that because nothing remains to be done by the vendor the purchaser is entitled to claim delivery from the warehouseman. In my opinion all three of the plaintiffs' contentions fail, and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion and for the same reasons.

SCRUTTON L.J. This case raises a question of considerable importance to the corn trade, but in the view that I take of the matter after a careful consideration of the facts

(1) 12 East, 614. (2) 4 Taunt. 644.
(3) 5 Taunt. 176.

and the course of the action, the point to be decided becomes ultimately a very narrow one. Messrs. Alcock deposited 618 quarters of maize, ex ss. *Harperley*, in the defendants' warehouse. They then sold to Messrs. Wilkes 200 quarters, "terms net cash." There was no evidence what "terms net cash" in the corn trade meant. But in the absence of any such evidence it must be assumed the words meant that before the purchaser got delivery he must pay the price. Now there is authority for the proposition that, in the case of a sale on those terms, if the vendor has done some act tending to pass the property, he may, in the event of the purchaser not paying, rescind what he has done. An illustration of that is to be found in *Godts* v. *Rose*. (1) There the seller gave a delivery order on the wharfinger, whose clerk made the usual entry in his book and gave the purchaser a warrant or acknowledgment that he held the goods for him. But on the purchaser neglecting to pay the whole thing was treated as a nullity. In the present case Messrs. Alcock, having sold the maize to Messrs. Wilkes, gave them a delivery order, which Messrs. Wilkes sent by a messenger to the defendants' warehouse. The order was handed to the warehouseman, who said nothing. But he made an entry in the defendants' books of the receipt of the order, together with a note of the date at which under the order the warehouse charges would become payable by the purchasers. Messrs. Wilkes failed to pay net cash, and consequently, even if the fact of the entry in the defendants' books had been communicated to them, and could be said to have amounted to an acknowledgment that the defendants held 200 quarters of maize for them, it would have become wholly inoperative, and Messrs. Wilkes would have had no property which they could transfer to a sub-purchaser. At this time Messrs. Wilkes were largely indebted to the plaintiffs, and the plaintiffs thought it would be to their advantage to buy goods on credit from Messrs. Wilkes, so that they might be able to set off the price against the debt which was owed to

(1) (1859) 7 C. B. 229.

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them. They accordingly went to Messrs. Wilkes and bought 200 quarters of maize and got a delivery order, which they in turn sent to the defendants on February 19. This time the defendants not only said nothing on receiving the order, but made no entry in their books relating to it. On February 26 the plaintiffs, being desirous of getting something of more value than a delivery order, wrote to the defendants for a warrant, but before their letter was received Messrs. Alcock had sent an order to the defendants to stop delivery on the ground that they were unpaid vendors with a lien. Thereupon this action was commenced, the writ being issued on May 22. It started as a simple action of detinue, the claim being that by reason of the delivery order signed by Messrs. Wilkes and lodged with the defendants the plaintiffs became entitled to the property in the maize specified in the order. After the delivery of the statement of claim a further claim was set up that the defendants by not raising any objection at the time of the receipt of the delivery order led the plaintiffs to believe that they were holding the maize on their behalf and were estopped from disputing that they were entitled to delivery. And then at the trial it was alleged, in further support of this second claim, that there was a custom of the trade that omission by the warehouseman to take objection to the delivery order for the space of twenty-four hours amounted to an attornment. I will deal with those three grounds of claim in their order. The first contention, that upon a sale of goods forming a portion of a larger quantity the mere giving of a delivery order is sufficient to pass the property before severance from the bulk, was rested on the authority of *Whitehouse* v. *Frost*. (1) I personally have not understood why these old cases have been discussed, because it seems to me that the Sale of Goods Act has settled the question, whatever *Whitehouse* v. *Frost* (1) may have said. Sect. 16 of that Act (56 & 57 Vict. c. 71) says: "Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods

(1) 12 East, 614.

are ascertained." There is no doubt here that the goods were not ascertained. They were 200 quarters of maize, part of 618 then lying in the defendants' warehouse, but which had never been separated. It seems to me that there is no use in going into the old authorities where the question in dispute is settled by a later statute. This was apparently the view taken by Lord Dunedin in *Hayman* v. *M'Lintock*. (1) That was an action of multiplepoinding to determine the right of a trustee in bankruptcy to 1174 sacks of flour then lying in Hayman's stores, portions of which were claimed by various persons, some of whom had advanced money to the bankrupt on the security of bills of lading, while others had purchased a certain number of sacks from the bankrupt and received delivery orders upon Hayman. Counsel for the latter claimants argued that, as the sacks had been bought and paid for and delivery orders granted, the property passed to the purchasers, relying on *Whitehouse* v. *Frost* (2), to which the trustee's counsel at once replied that the case of *Whitehouse* v. *Frost* (2) "was not an authority; it had always been doubted," referring to Benjamin on Sale and Bell's Commentaries. But when the Lord President came to give judgment he said nothing whatever about *Whitehouse* v. *Frost* (2); he treated the question as depending solely upon the Act of Parliament. After dealing with the claims of the bill of lading holders he said: "That leaves 424 bags in the hands of the trustee representing the bankrupt, and upon these 424 bags arises a subsequent question with persons of the name of McConnell & Reid and J. K. Stewart. That question arises out of this, that after the bankrupt had got the flour into the store he entered into a contract of sale for certain of these bags in favour of these parties. There is no question as to the contract of sale of the flour lying in the store; but before anything was done in the way of separating the bags, there came the bankruptcy. The trustee in the bankruptcy appeals simply to s. 16 of the Sale of Goods Act, which specially provides that where there is a sale of

(1) 1907 S. C. 936, 951. (2) 12 East, 614.

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unascertained goods the property shall not pass until the goods shall have been ascertained. Here nothing was done to ascertain the goods. These flour bags were not separately marked, and although, doubtless, if the buyer here had gone to the storekeeper and had got him to put aside the sacks or mark them, or put them into another room, that would have passed the property, yet, as he did none of those things, the property, it seems to me, did not pass." In the present case it appears to me that Laurie & Morewood had no claim as owners, the goods were not their property, for they had never been ascertained. I do not say anything more about *Whitehouse* v. *Frost*. (1) The Sale of Goods Act says distinctly that it is bad law, and there is an end of the matter.

Then the plaintiffs set up a second claim, which was to the effect that though they might not in fact have a right of property in any of the goods in the defendants' warehouse, yet as they had brought the defendants a delivery order, and the defendants had accepted it, thereby in substance representing that they had goods in their possession belonging to the plaintiffs of the kind and amount specified in the order, they could not be heard to say that they had not got them. That turns upon whether what took place amounted to an attornment by the defendants. As far as the plaintiffs' delivery order was concerned nothing happened except that it was handed to the defendants. No entry of the fact was made in the defendants' books; there was nothing but the bare fact that it was handed in. Therefore one is left with the question whether the mere handing in without more amounts to an attornment by the warehouseman, it having to be assumed, for the purpose of this argument, that there were in fact no goods belonging to the plaintiffs' vendors in the warehouseman's possession. It was thought that the case for attornment would be strengthened if it could be shown that by a custom of the trade absence of objection by the warehouseman to a delivery order was after a short

(1) 12 East, 614.

interval to be treated as an admission, and accordingly a pleading was drawn alleging the following custom—namely, that "If the delivery order is sent through the post or by messenger, the person in whose favour it is issued is entitled to assume that the wharfinger will hold and deliver a particular quantity to that person's sub-order, unless the wharfinger forthwith, that is to say within twenty-four hours, either returns the delivery order, or in any other way intimates that he cannot accept it." That does not appear to be an unreasonable custom, if it can be established. But, although a number of witnesses were called to prove it, their evidence fell very far short of showing that it was universally recognized, and accordingly Sankey J. found that the custom was not proved. In the absence then of the possibility of proving an attornment by a custom of the trade, the question, as I have said, is narrowed down to this: Is it enough to constitute an attornment by the warehouseman to the person presenting the delivery order that, the order being sent by a messenger, it should be received by a clerk and nothing said? I think, myself, that a very little will suffice to create an attornment. If the warehouseman writes on the order in the presence of the messenger the word "accepted," so that he sees it; if he makes delivery of part of the goods, as in the case of *Gillett* v. *Hill* (1), where a delivery of five sacks of flour in compliance with an order to deliver "5 sacks ex 20," was held to be an admission of the possession of twenty sacks; if he makes a claim for charges on the person presenting the delivery order; or if he tells him that he has entered his right to the goods in his books. In each of those cases I think it ought to be found that the warehouseman had attorned. But I do not see how it is possible to get an attornment or recognition of the title of the person named in the order out of the mere fact that an order is brought by a messenger and given to a clerk, where nothing is done which is communicated to the other party. To raise an estoppel there must be something of which the party setting up the estoppel has

(1) 2 Cr. & M. 530.

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notice, and which influences his conduct, but here the plaintiffs had no notice of anything at all. If that is so, the three grounds upon which this action is founded fail—the plaintiffs have no property in the goods claimed; no facts were communicated to them which could preclude the defendants from disputing an attornment; and no custom that twenty-four hours' silence amounted to an attornment was proved.

Appeal dismissed.

Solicitors for the appellants: *Keene, Marsland, Bryden & Besant.*

Solicitors for the respondents: *Sturton & Sturton.*

J. F. C.

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Nov. 25.

PRITCHARD, APPELLANT *v.* JAMES CLAY (WELLINGTON), LIMITED, RESPONDENTS.

Master and Servant—Wages—Piece Work—Agreed Price for complete Piece of Work—Variations agreed for defective Work—Deductions from Wages—Truck Act, 1896 (59 *&* 60 *Vict. c.* 44), *ss.* 2, 4.

The appellant was employed by the respondents as a moulder of iron pipes upon piece work. The agreement for his remuneration, made when he entered the employment, provided that he should be paid an agreed price of 5¾*d.* for a complete pipe, 6 feet long and free from defects; and that if he delivered a pipe which was incomplete or defective, he should be paid an agreed price which varied in amount according to the nature of the defect. On two occasions he was paid 9*s.* 2*d.* and 2*s.* 8*d.* respectively less than he would have received had the pipes he delivered been complete and free from defects. On an information against the respondents for making those deductions contrary to the Truck Act, 1896:—

Held, that the two sums were deductions "for or in respect of bad or negligent work or injury to the materials or other property of the employer" within s. 2 of the Truck Act, 1896, and inasmuch as the conditions prescribed by that section under which alone the deductions could lawfully be made—namely, affixing the terms of the contract in a place where they could be easily seen, and supplying the appellant with particulars in writing showing the acts or omissions in respect of which the deductions were made—had not been complied with, the respondents were guilty of an offence against the Act.

CASE stated by Salop justices.

The appellant preferred an information against the

respondents under the Truck Act, 1896 (1), for having on June 26 and July 3, 1925, made deductions of 9*s.* 2*d.* and 2*s.* 8*d.* respectively from his wages contrary to the said Act.

On the hearing of the information the following facts were proved or admitted :—

The respondents were iron founders, producing among other things iron pipes, and the appellant was employed by them on piece work only as a moulder of these pipes, and the agreement for remuneration made by them with him was as follows :—

(1.) The appellant was paid an agreed price of $5\frac{3}{4}d.$ for a complete pipe 6 feet long and free from defects.

(2.) If a pipe was delivered that was incomplete or defective, an agreed price was nevertheless paid to the appellant. Such agreed price was a price fixed at the time of the appellant's employment as a piece worker for the delivery of an incomplete or defective pipe.

(1) Truck Act, 1896, s. 2, sub-s. 1 : "An employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman, or for any payment to the employer by the workman for or in respect of bad or negligent work or injury to the materials or other property of the employer, unless :—

(*a*) The terms of the contract are contained in a notice kept constantly affixed at such place or places open to the workmen and in such a position that it may be easily seen, read and copied by any person whom it affects ; or the contract is in writing, signed by the workman ; and

(*b*) The deduction or payment to be made under the contract does not exceed the actual or estimated damage or loss occasioned to the employer by the act or omission of the workman, or of some person over whom he has control, or for whom he has by the contract agreed to be responsible ; and

(*c*) The amount of the deduction or payment is fair and reasonable, having regard to all the circumstances of the case."

Sub-s. 2 : "An employer shall not make any deduction or receive any such payment unless :

(*a*) The deduction or payment is made in pursuance of, or in accordance with, such a contract as aforesaid ; and

(*b*) Particulars in writing showing the acts or omissions in respect of which the deduction or payment is made and the amount thereof are supplied to the workman on each occasion when a deduction or payment is made."

Sect. 4 makes it an offence for an employer to enter into any contract, or to make any deduction or receive any payment, contrary to the Act.

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(3.) If through any defect it was necessary for the respondents to cut a portion off a pipe, payment was made as for the length remaining, e.g., if 2 feet were cut off, the appellant was paid $4\frac{3}{4}d.$, the agreed price fixed as aforesaid for a 4 feet pipe.

(4.) If a pipe was bent so that it was necessary for the respondents to have it straightened, $5\frac{1}{4}d.$, the agreed price fixed as aforesaid for a bent pipe, was paid to the appellant.

(5.) If a pipe was too rough so that it was necessary for the respondents to have it ground, $5\frac{1}{4}d.$, the agreed price fixed as aforesaid for a rough pipe was paid to the appellant.

(6.) If holes in the pipe had not been properly cored, or if it was necessary for the respondents to drill holes, the appellant was paid the sum of $5\frac{1}{2}d.$ or $5\frac{7}{12}d.$ respectively, these being the respective agreed prices fixed as aforesaid for such pipes when delivered.

By reason of the said variations in payment the appellant on June 26 and July 3, 1925, was paid by the respondents wages that were less by the amounts of 9*s.* 2*d.* and 2*s.* 8*d.* respectively than he would have received for the same number of pipes had they been complete and free from defects. No notices containing the terms of the said agreement were kept by the respondents, as required by the Truck Act, 1896, and no particulars in writing were supplied to the appellant, as required by the said Act. In the state in which the pipes left the appellant's hands it was not possible for him to determine accurately whether the pipes were complete and free from defects or whether and to what extent they were incomplete or defective, but the condition of the pipes after delivery was checked by persons appointed for that purpose by the respondents in conjunction with other persons appointed by the general body of the respondents' workmen for the purpose.

For the appellant it was contended that the said agreement was one for deductions from the sums contracted to be paid by the respondents to the appellant contrary to the Truck Act, 1896, and that the said sums of 9*s.* 2*d.* and 2*s.* 8*d.* were deductions made by the respondents contrary to the Act.

For the respondents it was contended that the Truck Act, 1896, did not apply to the system of wages in force at their works, and that they had in fact made no deductions from the agreed remuneration.

The justices being of opinion that the said sums of 9*s.* 2*d.* and 2*s.* 8*d.* were not deductions made by the respondents from the sums contracted to be paid by them to the appellant within the meaning of the Truck Act, 1896, dismissed the information; and the question for the opinion of the Court was whether they were right in so holding.

Joy K.C. and *T. S. Sanderson* for the appellant. The agreement entered into is a mere expedient for evading the Truck Act, 1896. The provisions of that Act cannot be got rid of by calling what is in essence a deduction for negligent work a variation of the rate of wages. The conditions set out in s. 2 of the Act have not been complied with to make such an agreement lawful, and therefore the deductions complained of were improperly made and the respondents have committed an offence by making them.

[They referred to *Gould* v. *Haynes*. (1)]

Bosanquet K.C. and *Alexander Graham* for the respondents. The justices were right in dismissing the information. Sect. 2 of the Truck Act, 1896, which is a penal section and must be strictly construed, provides that an employer shall not, except under certain conditions, make a contract for any deduction from the sum contracted to be paid to the workman. In this case therefore it is necessary to see what was the sum contracted to be paid to the appellant, and the only way that can be arrived at is by ascertaining what in fact he earned by the work he did. If he made a complete and perfect pipe he received something in the nature of a bonus for good work, and if he made a defective pipe he received what his work thereon was taken to be worth. That is a very different thing from making a deduction from a definite rate of wages irrespective of the nature of the work actually performed. In *Deane* v. *Wilson* (2), where a bonus was given to employees

(1) (1889) 61 L. T. 732. (2) [1906] 2 I. R. 405.

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for full attendance and withheld if they were absent for any time, it was decided that the deduction of the bonus from the wages of an employee who was absent for a quarter of a day was not a contravention of the Truck Act. It is further submitted that piece workers are not within the Act: see *Sleeman* v. *Barrett.* (1)

Joy K.C. in reply. The Truck Acts apply to piece workers. Sect. 2 of the Truck Amendment Act, 1887, which is to be read as one with the Act of 1896, extends to any workman as defined by s. 10 of the Employers and Workmen Act, 1875, and by that section piece workers are clearly included in the term "workman."

LORD HEWART C.J. stated the facts, read s. 2 of the Truck Act, 1896, and continued: What was the contract with the appellant? Was it a contract to produce incomplete and defective pipes, or was it a contract to produce complete pipes of a certain length and free from defects? To my mind it is clear that the contract was that the appellant should produce a complete pipe 6 feet long and free from defects, for which he was to be paid $5\frac{3}{4}d.$ That was the standard or normal pipe, and that was the basis of the contract of employment. There follows in the statement of facts a series of variations of the sum of $5\frac{3}{4}d.$ These depend upon whether the pipe was of the right length, whether it was straight or bent or was short or too rough, or whether the holes in it had been properly cored; in other words, the variations depended upon the performance of the appellant in producing his work. One can scarcely imagine a more exact repetition of what is struck at by s. 2 of the Truck Act, 1896—a deduction "for or in respect of bad or negligent work or injury to the materials or other property of the employer." In my opinion this was, in the words of Mr. Joy, an ingenious attempt to get round the Act which does not succeed.

The appeal must, I think, be allowed.

SANKEY J. I agree. It is only necessary to say that the appellant was employed to make complete pipes. The other

(1) (1864) 33 L. J. (Ex.) 153.

paragraphs of the case refer to bad workmanship in respect of which a deduction was made.

TALBOT J. I am of the same opinion. The only possible ground upon which the justices' decision could be supported is that suggested by Mr. Bosanquet—namely, that the Truck Act, 1896, does not apply to piece work. *Sleeman* v. *Barrett* (1), which he cited, turned entirely upon the use of the word "wages" in the statute then in force, but by the Employers and Workmen Act, 1875, applied by the Truck Act, 1887, with which (amongst others) the Truck Act, 1896, is to be read as one, the expression "workman," while it does not include a domestic or menial servant, includes all others engaged in manual labour for an employer, whether under contracts of service or under contracts for the personal execution of work. *Sleeman* v. *Barrett* (1) throws no light upon the construction of this Act.

Appeal allowed.

Solicitors for appellant: *Mills, Lockyer, Church & Evill, for R. Nelson Jones, Birmingham.*

Solicitors for respondents: *Gibson & Weldon, for R. Gwynne, Wellington, Salop.*

(1) 33 L. J. (Ex.) 153.

J. S. H.

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Dec. 2.

[IN THE COURT OF APPEAL.]

PROCTER GARRETT MARSTON, LIMITED *v.* OAKWIN STEAMSHIP COMPANY, LIMITED.

Ship—Charterparty—Port of Call for Orders—Time limited for Orders—Detention—Duty of Shipowners—Reasonable Time to wait for Orders—Sale of Goods—Cargo on board Ship—"Arrived at" Port—Condition—Damages.

A charterparty provided that the ship should proceed to a port of call for orders concerning the port of discharge; that orders should be given to the master within twenty-four hours after receipt of his report of his arrival at the port of call, and that for any detention of the ship while awaiting orders after the twenty-four hours the charterers should pay the shipowners extra remuneration. Orders not having been sent within the twenty-four hours aforesaid, but having been sent within twenty-four hours after they had elapsed:—

Held, that it was the duty of the shipowners to have the ship at the port of call for the twenty-four hours and for a reasonable time thereafter; that in the circumstances twenty-four hours after the expiration of the first period of twenty-four hours was a reasonable time; and that, the ship having left before this reasonable time had elapsed, the owners had committed a breach of the charterparty.

The charterers sold the cargo on board the ship as "shipped per ss. *W.* arrived St. Vincent." The ship had arrived at St. Vincent, but, through the shipowners' breach of the charterparty, had left before the date of the contract. On discovering this the purchasers refused to accept the cargo except at a sum which was 300*l.* below the contract price, to which the charterers agreed.

Held, that it was a condition of the contract that the ship should have arrived at St. Vincent and should be there at the date of the contract; that the purchasers were entitled to refuse the cargo except upon the terms that the contract price should be reduced by 300*l.*, and that this compromise was a reasonable one.

Held consequently that the charterers could recover the sum of 300*l.* from the shipowners as damages for the breach of the charterparty.

Decision of Roche J. affirmed.

APPEAL from the decision of Roche J. upon a case stated by an arbitrator under s. 7 of the Arbitration Act, 1889.

The special case was as follows:—

1. By a charterparty dated June 26, 1924, the owners of the steamship *Watsness* chartered their vessel to the charterers. A copy of the charterparty is annexed and forms part of this case.

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2. The matter in dispute in the arbitration was the charterers' claim for damages in respect of the failure of the master of the steamship to wait, after arrival at St. Vincent, the port of call, for orders from the charterers relating to the port of discharge and in sailing from St. Vincent before receiving such orders.

3. The material clauses in the charterparty were :—

(2.) "That the steamer . . . . shall proceed as ordered by the charterers . . . . to the undermentioned ports or places and there receive from them a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ maize $\frac{\text{and}}{\text{or}}$ rye. . . . .

(4.) Being so loaded the steamer shall with all reasonable speed proceed to St. Vincent (Cape Verde) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar at the master's option for orders (unless these be given to him by the charterers on signing bills of lading), to discharge at a safe port in the United Kingdom or on the Continent" within certain named limits.

(22.) "Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees . . . . of his arrival at the port of call, and for any detention waiting for orders after the aforesaid twenty-four hours, the charterers or their agents shall pay to the steamer 30 shillings sterling per hour. The master shall give written notice to the charterers before signing final bill of lading whether he will call at St. Vincent, Las Palmas, Teneriffe, Madeira or Dakar for orders. Should cable communication with the port of call be interrupted the steamer shall proceed to Lisbon, Queenstown or Falmouth at the master's option for orders and the master is to advise the charterers' agent of his arrival at the port of call."

4. The steamer left Rosario under the said charterparty on July 2, 1924, with a cargo of maize.

5. Before the ship left the master orally informed one of the managers of the charterers' office that the ship would be calling at St. Vincent and probably at Las Palmas. No point arises between the parties that written notice had not

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been served by the master under cl. 22, and the arbitration proceeded upon the footing that written notice should be taken to have been given.

6. The final bill of lading signed at Rosario commenced: "Shipped . . . . on board the *Watsness* now lying in the port of Rosario and bound for orders to St. Vincent." . . . .

7. The steamer arrived at St. Vincent on August 2, 1924, at 2.40 P.M.

8. Before leaving Rosario the charterers had given the master a written notice instructing him on arrival at the port of call to apply to them at 87 Leadenhall Street, London, for instructions.

9. About twenty-four hours before the steamer's arrival at St. Vincent her master had sent a wireless message to the charterers at their said London address advising them that the ship was proceeding to St. Vincent waiting for orders.

10. On Saturday, August 2, 1924, after arrival at St. Vincent the master cabled to the charterers at their said London address: "*Watsness* arrived awaiting orders."

11. The said cable was received by the charterers at 9 A.M. on Monday, August 4, 1924—a bank holiday.

12. By a contract in writing dated August 6, 1924, the charterers sold the said cargo as "shipped in good condition per ss. *Watsness* arrived St. Vincent" to William H. Pim Junior & Co., Ld., and on the same day cabled to the master at St. Vincent to proceed to Bilbao to discharge. A copy of the contract is annexed and forms part of this case.

13. Meanwhile the steamer had waited at St. Vincent until 8 P.M. on August 2, when she left, the master having instructed his agents that if any message should come through to him they were to transmit it to him by wireless.

14. The steamer arrived at Las Palmas at 2.30 P.M. on August 7, and on arrival there the master received the charterers' orders to proceed to Bilbao forwarded by his agents from St. Vincent by wireless.

15. On August 14, 1924, William H. Pim Junior & Co., Ld., the buyers, having learned that the steamer was not at the date of their contract awaiting orders at St. Vincent, refused

to accept the cargo upon that ground, and, the market being down, the matter was subsequently compromised between the charterers and the buyers by the latter accepting the cargo with a deduction of 302*l.* 4*s.* 8*d.* from the contract price.

16. The charterers contended :—

(*a*) That under the provisions of the charterparty it was the duty of the master to wait at St. Vincent until he received orders concerning the port of discharge or alternatively to wait for a reasonable time after the expiration of twenty-four hours.

(*b*) That leaving St. Vincent without such orders and before the expiration of twenty-four hours constituted a breach of the charterparty.

(*c*) That by reason of this breach the charterers had suffered damage to the amount of 302*l.* 4*s.* 8*d.*

17. The owners contended :—

(*a*) That they had committed no breach of the charterparty.

(*b*) That the master was under no obligation to wait at St. Vincent (i.) after the expiration of twenty-four hours, or (ii.) at all, provided that before leaving he had made effective arrangements to have his orders forwarded to him by wireless.

(*c*) That the charterers were under no liability to their purchasers under their contract of sale.

(*d*) That they were protected by cl. 29 of the charterparty.

(*e*) That the damages claimed were too remote and were irrecoverable.

18. I find as a fact that if the charterers were under any liability to their purchasers the compromise was a reasonable and proper one for the charterers to make. I also find that if there was a breach of the charterparty by the owners the damages to which the charterers would be entitled would (subject to the same being recoverable in law) be the sum of 302*l.* 4*s.* 8*d.*

19. Subject to the opinion of the Court I find and award that the owners are under no liability to the charterers by

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reason of the fact that the steamship left St. Vincent in the circumstances above set out. . . . .

20. The question for the opinion of the Court is whether on the true construction of the charterparty and on the facts stated in this special case my award is right or wrong.

The special case was heard before Roche J., who held on the analogy of *Wilson & Coventry, Ld.* v. *Otto Thoresen's Linie* (1) and *Inverkip SS. Co.* v. *Bunge & Co.* (2), that cl. 22 of the charterparty obliged the shipowners to have their ship at St. Vincent for twenty-four hours and to keep her there for at least a reasonable time thereafter for the purpose of receiving orders there; and that, August 2 being a Saturday and August 4 a bank holiday, a reasonable time had not elapsed when on August 6 orders arrived that the ship should proceed to Bilbao. He also held that it was a condition of the contract of sale of August 6 that the ship should then be at St. Vincent so that the master might receive orders there. He further held that the damages were not too remote, and therefore gave judgment for the charterers for 302*l.* 4*s.* 8*d.*

The owners appealed.

Dunlop K.C. and *H. L. Holman* for the appellants. First, there was no breach of the charterparty. When a ship is chartered to go to an intermediate port for orders she is not bound to wait there until the charterer chooses to give orders. If the orders are not given within the specified time the ship may proceed to the next port named in the charterparty, especially if, as in this case, there is an effective ship's agent at the port of call and the ship is fitted with wireless apparatus. So long as the master receives orders in time to carry them out there is no breach of the charterparty. Here the orders were to be given within twenty-four hours after the charterers received notice that the ship was at the port of call. The charterers received that notice on the morning of August 4. They sent no orders till August 6. They and not the owners were in default. True, the charterparty provides that for any detention waiting for orders after twenty-four hours

(1) [1910] 2 K. B. 405. (2) [1917] 2 K. B. 193.

the charterers are to pay the owners at the stipulated rate; but that must mean for detention through delay in transmitting the telegraphic report. Liberty to delay giving orders for forty-eight hours cannot be implied in face of an express obligation to give orders within twenty-four hours.

[BANKES L.J. The ship did not wait for twenty-four hours.]

The charterers do not rely on that. They claim on the ground that she was not at St. Vincent on August 6, forty-eight hours after they received notice of her arrival there. There was no obligation on the ship to be there after August 5.

[SCRUTTON L.J. referred to *Sieveking* v. *Maass.* (1)]

Secondly, there was no misstatement in the contract of sale. The *Watsness* had arrived at St. Vincent. There was no statement express or implied that she was there on August 6, where in the appellants' view she was not bound to be. Therefore the purchasers had no claim against the respondents, and consequently the respondents had none against the appellants, because the settlement for 302*l.* was a settlement of a non-existent claim.

[WARRINGTON L.J. Was there not sufficient doubt to warrant a compromise ?]

Thirdly, the damages, if any are recoverable, are merely nominal.

Kennedy K.C. and *Van Breda* for the respondents were not called upon.

BANKES L.J. This is a dispute between charterers and shipowners. The questions are: (1.) whether the shipowners committed a breach of the charterparty, and (2.) whether the damages claimed by the charterers are recoverable. Roche J. has decided that the charterers were justified in their claim. The charterparty provided that the ship should proceed to a loading place on the river Parana and there load a cargo of wheat, maize, or rye and then proceed to St. Vincent or Las Palmas or Teneriffe or Madeira or Dakar at the master's option for orders. St. Vincent was the port

(1) (1856) 6 E. & B. 670.

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chosen. The ship arrived there on Saturday, August 2, 1924, at 2.40 P.M. The charterparty further provided that orders concerning the port of discharge should be given to the master within twenty-four hours after the receipt by the consignees of the master's telegraphic report to the consignees of his arrival at the port of call, and that for any detention waiting for orders after the aforesaid twenty-four hours the charterers or their agents should pay to the owners 30 shillings per hour. Very likely the master thought that, the next day being Sunday and the day after being a bank holiday, some considerable time might elapse before he got his orders. At any rate he left St. Vincent without getting orders at 8 P.M. on Saturday, leaving instructions that any orders from the charterers should be transmitted to him by wireless telegraphy, and sailed away. The cable message which he had sent on his arrival was not delivered till Monday, August 4, at 9 A.M. The charterers or consignees did not take any action until Wednesday the 6th. On that day they sold the cargo by a contract which described it as "shipped . . . . per ss. *Watsness* arrived St. Vincent." After the sale of the cargo orders were sent to the master of the ship to go to Bilbao. Those orders were received at St. Vincent and were sent on by wireless telegram which was received by the master on August 7 at Las Palmas. When the purchasers of the cargo ascertained that the ship was not at St. Vincent on August 6 they refused to take the cargo on the ground that this was a breach of a condition. So one question in this case arises upon the construction of the contract of sale —namely, whether it was a condition of the contract that the ship should be at St. Vincent and the master in a position there to receive orders from the purchasers to proceed to the port of destination. In my opinion it is plain on the construction of the contract that this was a condition, because otherwise the contract contains no provision for orders to proceed anywhere. Under the heading "Destination" it allows a selection from a number of ports; as originally drawn it contained the words "calling at St. Vincent or elsewhere for orders as per charterparty," but these words

were struck out, obviously because the ship was supposed to be at St. Vincent as a port at which orders were to be given and received. Therefore it was a condition of the contract that the ship should be at St. Vincent on August 6, and as she was not there the purchasers were justified in refusing to accept the cargo.

With regard to the damages both the judge and the arbitrator agree in holding that the compromise was a reasonable one. The figure of 302*l.* has been criticized by counsel for the appellants; nevertheless in view of the expense which would probably be incurred in litigating the question I agree that the compromise was reasonable.

Then comes the question whether the shipowners had committed a breach of the charterparty. Put plainly their contention is that an implied proviso—namely, that the master may leave the port of call if he gives directions that orders received there shall be transmitted by wireless, may be appended to the express obligation that he shall proceed to the port of call for orders. I do not find any language in the charterparty to suggest any such implication. The charterparty prescribes an old-fashioned way of communicating information to a ship abroad. The master is to take the ship to the port of call and to send to the consignees a telegraphic report of his arrival there. Within twenty-four hours of receiving this report the consignees are to give orders as to the port of discharge. That is by cl. 22, and the construction of the clause is plain: the master must go to the port of call and must be in a position there to receive orders. It is impossible to hold that he may leave the port of call and proceed on his voyage and receive orders on his way. Here the orders were to be given within twenty-four hours of receipt by the consignees of the master's report. In my opinion the master was bound to remain at the port of call for at least twenty-four hours, if he received no orders before that time elapsed, so as to enable him to receive the orders there; and moreover I think the learned judge was right in holding that if orders were not received within that time it was the duty of the master to remain for a reasonable

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time after the expiration of the twenty-four hours. There was therefore in the circumstances a clear breach of the charterparty, and I agree with Roche J. that by the time when the consignees gave the order to proceed to Bilbao a reasonable time had not elapsed. The charterers were entitled to assume that the charterparty had been performed and not broken, and to sell the cargo with a condition that the ship was at St. Vincent, and to recover from the shipowners the damages incurred through their breach as the result of which the purchasers refused to accept the cargo. The amount of the damages has been held to be reasonable, and the appeal must therefore be dismissed.

WARRINGTON L.J. I am of the same opinion for the same reasons.

SCRUTTON L.J. I agree. It is time that the practice in cases like the present should find its way into the reports. When a charterer hires a ship for a whole cargo he generally means to sell the cargo while afloat. He may find it convenient to alter the ship's destination to suit the convenience of his purchaser, and so for seventy years it has been a common provision in charterparties that the ship shall proceed to a port of call for orders. That always means that she is to go to the port of call and wait there for the orders. I am astonished to hear it suggested that the master may proceed on his voyage, merely leaving directions where or how orders may be transmitted to him. To the already existing risk of the orders miscarrying on the way from the charterers or their purchasers to the port of call this suggestion would add a second risk of miscarriage—namely, on the way from the port of call to the ship on the high seas or wherever she may be. When *Sieveking* v. *Maass* (1) was decided the form of this provision was that the ship should proceed to a port of destination "as ordered on signing bills of lading" or with the ship's agents at a named port. In that case Elsinor was named as the port of call. The question was what was

(1) 6 E. & B. 670.

the master to do when he arrived at Elsinor and found no orders. Lord Campbell C.J. in the Court of Queen's Bench and Jervis C.J. in the Exchequer Chamber held that after waiting a reasonable time for orders the master might proceed to some other port named in the charterparty. It is clear from this that it is the master's duty to go to the port of call and, if the orders are not there, to wait there for a reasonable time for their coming forward. Since 1856 the practice has become more elaborate. It is usually the master's duty to communicate to the charterer's office that the ship has arrived at the port of call. The charterers then have a reasonable time in which to give orders where she is to go, and if orders are not given within a reasonable time they must pay for detention of the ship. There is never an express clause that the ship is to wait, just as there is no express provision that the ship is to wait while being loaded or discharged; the provision is that she is to be loaded or discharged within a certain time, and if not loaded or discharged within that time the owners are to receive extra remuneration. But beyond doubt if the ship is not loaded or discharged within the specified time it is her duty to wait a reasonable time, although there is no express provision to that effect. Therefore I agree with Roche J. in holding that port of call means "a place for the receipt of orders in regard to the port of discharge" and that "by necessary implication the charter obliges the shipowners to keep their ship at the port of call for twenty-four hours and, at any rate, a reasonable time thereafter." If I may quote the words of a living author, "Where a ship is chartered to proceed to a 'port as ordered,' the master is bound to wait a reasonable time for such orders": Scrutton on Charterparties and Bills of Lading, 12th ed. (1925), p. 125.

On the facts of this case the learned judge thought that although the charterers did not send any cable message of instructions within the specified twenty-four hours they did send such a message within twenty-four hours or thereabouts after that time had expired. I agree with the learned judge that on these facts the cable message was sent by the

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Scrutton L.J.

charterers "within a reasonable time thereafter," and consequently the shipowners committed a breach of the charterparty.

The second question is more puzzling. The charterers sold the cargo by a contract in writing which contained a statement that it was "shipped in good condition per ss. *Watsness* arrived St. Vincent." I agree with Roche J. that this means "per ss. *Watsness* arrived and still at St. Vincent." The present situation of the ship is a matter of importance to the buyer, who of course wants to know where to address instructions concerning the destination of the cargo. If the statement means that the ship was still at St. Vincent it was false. She was not there; she had to be discovered elsewhere. Here was a breach of a condition of the contract, a breach which entitled the purchasers to rescind the contract; but they were willing to take the cargo if the charterers would be content with a lower price. The charterers then claimed the difference, 302*l.* 4*s.* 8*d.*, from the shipowners as damages for the breach of the charterparty. And their claim is justified on the following ground: A shipowner must contemplate that his conduct may affect contracts made by the charterer for the sale of the cargo, and that the charterer is entitled to rely on the shipowner's contract that the ship shall be at a named place. And if, relying on the shipowner's contract, he states that the ship is at a port where she is not, he may say that any damages he has had to pay by reason of the misstatement are the natural and reasonable consequence of the shipowner's breach of contract. I had some doubt whether more than nominal damages had been incurred in this case, but not having before me any facts relating to the buyers' dealings with the cargo, I cannot interfere with the learned judge's finding of fact that the amount is reasonable.

Appeal dismissed.

Solicitors for appellants: *Holman, Fenwick & Willan.*
Solicitors for respondents: *Richards & Butler.*

W. H. G.

WILLIAMS *v.* STANLEY JONES AND COMPANY, LIMITED.

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Dec. 1.

Practice—Costs—Official Referee—Costs to follow Event—Costs of Issues—Claim for Balance of Account—Items—"Issue"—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14 (*a*), 15, *sub-s.* 2—*Rules of the Supreme Court, Order* XXXVI., *r.* 55 *B*; *Order* LXV., *rr.* 1, 2.

On a claim for balance of an account for commission containing twenty-four items the defendants succeeded on eight items on different grounds:—

Held, that each of the items was not a separate issue, and that the Official Referee in treating the action as one on a general account, and in giving the plaintiff the costs of the reference and refusing to give the defendants the costs of the items on which they succeeded, had acted rightly.

Reid, Hewitt & Co. v. *Joseph* [1918] A. C. 717 distinguished.

An issue is something which goes radically to the whole action or to a substantial part of the action—per Shearman J.

APPEAL from an Official Referee.

The plaintiff, the respondent, was a traveller who had been employed by the defendants, the appellants. He was discharged, and claimed from the defendants payment of 103*l.* 17*s.* 4*d.*, the balance of commissions which he alleged was due to him. He issued a writ in the High Court, and eventually the matter was referred by consent to an Official Referee under the provisions of s. 14 (*a*) of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), with no directions as to the costs. The plaintiff's claim was divided into some twenty-four items, and different defences were set up in respect of some of these items. On some eight of the items the defendants succeeded, on different grounds, and claimed that each of these constituted a separate "issue" within the meaning of Order LXV., r. 2, the "event" of which was in their favour, and that the Official Referee ought, in the exercise of his discretion under Order XXXVI., r. 55 B, to give them the costs of those issues. The defendants had paid a certain sum into court, but the Official Referee held that they were liable to the plaintiff in a sum of 14*l.* 15*s.* 11*d.* in excess of the amount paid in. He refused to give effect to the above contentions on behalf of the defendants, and gave

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judgment for the plaintiff for the balance due with costs on the High Court scale.

The defendants appealed.

Eric Sachs for the defendants. The Official Referee ought to have allowed the defendants the costs of the items upon which they succeeded. Each item was an "issue" within the meaning of Order LXV., r. 2, which says: "When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event." The action, being referred by consent, comes within s. 14 (*a*) of the Arbitration Act, 1889. By s. 15, sub-s. 2, the report of the Official Referee is, as regards costs, equivalent to the verdict of a jury: see *Carr Brothers* v. *Dougherty*. (1) Order XXXVI., r. 55 B, of the Rules of the Supreme Court gives the Official Referee the same discretion as to costs as a Court or judge would have, and by Order LXV., r. 1, costs are in the discretion of the judge, except that where the trial is by jury costs follow the event unless the judge otherwise orders. And by Order LXV., r. 2, the costs of separate issues are to follow the event. The position therefore was that the costs would follow the event unless the Official Referee otherwise ordered, and the costs of separate issues would follow the event of the issue. The Official Referee did not "otherwise order"; all he did was to decide that there were no separate issues. He was wrong in so deciding. The cases on what constitutes a separate issue were fully considered by the House of Lords in *Reid, Hewitt & Co.* v. *Joseph* (2), which decided that the words of Order LXV., rr. 1 and 2, "the costs shall follow the event" mean "that the costs are to be distributed according to the results of the several issues, while the party who is successful on the whole gets the general costs": per Lord Finlay L.C. (3) There must be some definite relief on the items on which the defendants succeeded, and each was an issue, because as to each there was a separate defence, and the

(1) (1898) 67 L. J. (Q. B.) 371. (2) [1918] A. C. 717.
(3) Ibid. 733.

decision thereon was the "event." A tribunal would not do its duty unless it considered each item separately.

The county court judge had no material upon which he could exercise his discretion under s. 11 of the County Courts Act, 1919 (9 & 10 Geo. 5, c. 73), when he ordered costs to be on the High Court scale. He purported to do so on the ground that the reference had lasted three days and that there was no machinery in the county court for dealing with it. Had the claims been confined to those on which the plaintiff succeeded the reference would not have lasted one day. The matter must be looked at with reference to the result, not to the original claim; otherwise a plaintiff could always get costs on the High Court scale by adding claims upon which he did not expect to succeed. An appeal lies from the decision of the Official Referee: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (1), which was approved by the Court of Appeal in *F. King & Co.* v. *Gillard & Co.* (2)

[*Slatford* v. *Erlebach* (3) was also referred to.]

Enness for the respondent. It is admitted that on a trial by jury costs follow the event of the issues distributively; but this is not so where the trial is without a jury, for the judge then has a discretion. But this was a claim for the balance of a general account, and it has not been the practice, and it would be impracticable, to treat each item of a general account as a separate issue. The case of *Reid, Hewitt & Co.* v. *Joseph* (4) was a different case from this. There the matter in dispute was whether certain goat's hair was up to sample, and whether there had been an overcharge for bags, and what was there said with regard to issues was not intended to apply to a case of the items of a general account like the present one. Even if each item was a separate issue the Official Referee had a discretion to grant costs to the plaintiff on the issues in which he failed.

The Court will not interfere with the exercise of his discretion by the Official Referee unless satisfied that he has

(1) [1903] 2 K. B. 756.
(2) [1905] 2 Ch. 7.
(3) [1912] 3 K. B. 155.
(4) [1918] A. C. 717.

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not exercised it or has applied some wrong rule in exercising it. He had here ample materials upon which to grant costs on the High Court scale.

[*Rotch* v. *Crosbie* (1); *Lever Brothers* v. *Masbro Equitable Pioneers Society* (2); and *Société des Hotels Réunis* v. *Hawker* (3) were also referred to.]

Sachs replied.

SHEARMAN J. This case has been very well argued on both sides. It involves a question of some importance, because, some seven years ago, the House of Lords in *Reid, Hewitt & Co.* v. *Joseph* (4) gave a new definition of the word "issue," and the attempt is here made to apply that definition literally to the circumstances of this case, and to show that whereas the Official Referee treated the whole action as one issue he ought to have treated it as a score of issues, or more.

The short history of the case is as follows. An action was commenced by the plaintiff, a traveller employed by the defendants and who had been discharged by them, for payment of commission he claimed to have earned. There were some twenty items in the claim. A writ in the High Court was issued and a summons taken out under Order XIV. The defence set up was that the money claimed was not yet due, and the case was put into the short cause list. It then became apparent to the defendants that other defences were open to them, not applicable to proceedings under Order XIV., and an order was made by consent sending the matter to an Official Referee. Before him the case took three days to try. The defendants, who had previously paid money into court, increased the amount, but in the result the Official Referee came to the conclusion that they had paid in 14*l.* 15*s.* 11*d.* too little, and he gave judgment for the plaintiff for the balance, with costs, and, after hearing argument, ordered that the costs should be on the High Court scale. As a result the costs were taxed at a sum out of all proportion

(1) (1909) 54 Sol. J. 30.
(2) (1912) 28 Times L. R. 294.
(3) (1914) 30 Times L. R. 423.
(4) [1918] A. C. 717.

to the amount in dispute. From that order this appeal is brought.

There are two grounds of appeal. Firstly, the defendants say that as they were successful as to some seven or eight of the items of the claim, on different grounds, the plaintiff ought to have no costs; and, secondly, that as they succeeded on these items, which they contend were separate issues, they were entitled to the costs of those issues. The Official Referee, however, took the view that this was a question of general account between the parties, and treated it as one matter, and on that ground made the order appealed from. He made no special order as to the costs of any specific issues, because, in his view, the whole matter was one dispute. It is said that the Official Referee was wrong and that he ought to have treated each of the items upon which the defendants succeeded as a separate issue, and have given them the costs of that issue. They had succeeded on different issues on different grounds—unexpired credit, overcharge, etc. It is said that under s. 15, sub-s. 2, of the Arbitration Act, 1889, the award of the Official Referee is equivalent to the verdict of a jury, and that it follows from the dicta in the case of *Carr Brothers* v. *Dougherty* (1) that an Official Referee has only the same power of dealing with costs as has a judge trying a case with a jury. In my opinion a number of cases, especially *Glasbrook* v. *Owen* (2), show that the only meaning of that expression is that his findings can be enforced by entering judgment as if there had been a verdict by a jury. The dominant rule, in my opinion, as to the powers of an Official Referee is Order XXXVI., r. 55 B, which is as follows: "Where the whole of any cause or matter is referred to an official referee under an order of court, he may, subject to any directions in the order, exercise the same discretion as to costs as the court or a judge could have exercised." That rule gives him the same power as is given to a judge who tries a case without a jury. What is his discretion? When the Judicature Act was passed, it was intended to leave the entire disposal of items and costs to the judge alone, as was the old Chancery

(1) 67 L. J. (Q. B.) 371. (2) (1890) 7 Times L. R. 62.

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Shearman J.

practice. An exception was then introduced that in cases tried with a jury costs should follow the event, unless the judge or Court should for good cause otherwise order, and there was no appeal from the judge unless he gave leave. That practice endured for twenty-five years. It has now been decided that there is an appeal without leave from a judge's order as to costs, when it can be shown that the judge has exercised a wrong discretion. It is now held that there are only two or three grounds upon which a judge can interfere with the right of a successful litigant to his costs. That is the law as recent decisions have fixed it, despite the Judicature Acts.

The costs of separate issues are dealt with by Order LXV., r. 2, and the question we have to consider is whether there were any separate issues in this action. A number of cases have decided what an issue is. In *Howell* v. *Dering* (1) an issue was defined as something which in one way or another disposed of the action. That case was discussed in the House of Lords in *Reid, Hewitt & Co.* v. *Joseph*. (2) In that case four judges laid down the law as to what constituted an issue. They held that event is to be read distributively, and that if a party defends any part of a claim and succeeds, that constitutes an issue, and that it is not necessary that the decision of an issue should dispose of the whole action. I am, however, utterly unable to believe that the words used in that context were intended to inaugurate a practice that where, for example, a tradesman sues a customer for the price of a number of different articles, or where a builder similarly sues a building owner, that every time a shilling or a pound is knocked off on the ground that the article was not ordered or that there has been an overcharge, there is a separate issue. I cannot conceive that the words used in the House of Lords in *Reid, Hewitt & Co.* v. *Joseph* (2) were intended to cover cases of this description. It has never been the practice, when a grocer sues for his bill—say for 80*l.*—and the items are disputed, that each item should be left as an issue to the jury as a separate matter. On the contrary it has always been

(1) [1915] 1 K. B. 54, 63. (2) [1918] A. C. 717.

the practice to leave the total amount to them, and, if they return a verdict for a lesser amount, that that verdict should carry costs.

In my judgment issue means something which goes radically to the whole action or to a substantial part of the action, and does not include the separate items of an account between traveller and principal, or between builder and building owner, or any similar account. The practice has always been to treat these as one action and one issue. In my opinion the Official Referee took the right course in so treating this action, and the defendants not having paid enough into court, he said that the plaintiff had won his action.

There is, however, a second ground of appeal. The Official Referee was asked by counsel for the defendants that he should make the order without costs, but, on the application of the plaintiff's counsel, he gave costs to the plaintiff and ordered that they should be taxed on the High Court scale. His discretion as to costs depends on Order XXXVI., r. 55 B, which I have already read. An attempt has been made to show that he exercised his discretion on wrong grounds, and, according to the decided cases, there is an appeal from his discretion on that ground. The Official Referee made the order on the ground of the length of the trial, the lack of proper machinery for its being dealt with in the county court, and on the ground that the case had been pronounced unsuitable for proceedings under Order XIV. I do not say that I should have made the order myself, but it is impossible for us to say that he had no materials upon which to exercise his discretion in the way he did exercise it; and where there are materials there is no appeal from that discretion.

In my judgment both grounds of appeal fail, and the appeal, therefore, must be dismissed.

SANKEY J. I preface my judgment by assenting to what my Lord has said as to our indebtedness to counsel who have argued this case.

In my opinion it is important to see what exactly were the facts. The plaintiff was a traveller in the employment of

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Sankey J.

the defendants, and was paid by commission, and that commission not having been paid he issued a writ claiming 103*l.* 17*s.* 4*d.*, the balance of commission he alleged to be due. The indorsement on the writ sets out the full amount, 287*l.* 17*s.* 4*d.*, and full particulars are given exceeding three folios. Then it gives credit for certain sums leaving the balance claimed, 103*l.* 17*s.* 4*d.* Under Order XIV., by which the plaintiff started the proceedings, a sum of 16*l.* 15*s.* 4*d.* was ordered to be paid, leaving 87*l.* 2*s.* in dispute. The defendants paid 5*l.* 16*s.* 11*d.* into Court, so that the amount left in dispute was 81*l.* 5*s.* 1*d.* Eventually, as the result of a three days' hearing before the Official Referee, the plaintiff was awarded 14*l.* 15*s.* 11*d.* above the sum paid into Court. He gave particulars of the items which made up his claim, twenty-four in number. In respect of some of them the Official Referee found in favour of the defendants, and the defendants contend that those items were separate issues, and that as they succeeded on them they were entitled to the costs of those issues. They do not dispute that the plaintiff is entitled to the general costs of the reference. I do not propose to examine all the items, but it was said by counsel for the defendants: "Take for instance one of the items on which they won; to prove their defence they had to bring up a witness from the country; they ought, therefore, to have the costs of that issue." He greatly relied on *Reid, Hewitt & Co.* v. *Joseph* (1), but before passing to the consideration of that case I desire to refer to some of the difficulties that would arise if we were to accede to his argument. They have already been put by my Lord. Assume that this was an action by a grocer for payment of a bill containing twenty-four items, the argument is, that if the defendants succeeded on ten of them they could say that having succeeded on ten issues they were entitled to the costs of them. Suppose the action was tried before a jury, and that the claim was for 80*l.* odd, and the jury found that the plaintiff was entitled to 50*l.* Is the jury to return a separate verdict on each item, and are their twenty-four verdicts to be taken so that

(1) [1918] A. C. 717.

the taxing Master may allocate the costs to each issue? Such a course would immensely lengthen the task of juries and taxing officers, and all I say is that if we were to hold that to be the proper course our decision would lead to most startling results. Cases of claims on other bills might be instanced; for example, bills for work done and materials supplied, a builder's account for the building of a house, and so on. Are there in such cases to be separate verdicts in respect of each item? Counsel for the defendants quite rightly says that the Court must look at the case of *Reid, Hewitt & Co.* v. *Joseph* (1), which is much in his favour. But that decision must be read secundum subjectam materiam, and remarks applied to the circumstances of that case must not be applied to an ordinary action on a balance of account. The facts in that case were quite different. The matter which was being litigated was whether certain goat's hair which had been sold by sample was up to sample. The Court was considering whether that constituted an issue. The headnote correctly sets out the decision, and it was held that an issue need not go to the whole cause of action. I do not think that the House of Lords meant that their decision was to refer to every action for the balance of an account. I cannot think or hold that every item in the present claim was a separate issue. Therefore on the main point I am satisfied that we ought not to accede to the arguments addressed to us on behalf of the defendants. On the other point, as to the exercise by the Official Referee of his discretion, I entirely agree with my Lord and desire to add nothing.

I think, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Judge & Priestley.*
Solicitor for respondent: *H. Davis.*

(1) [1918] A. C. 717.

W. L. L. B.

1925
Nov. 10, 11.

SUTTLE AND OTHERS *v.* CRESSWELL.

Gaming—Betting—Football—Coupon contained in Newspaper—Prizes for forecasting winning Teams on Coupon—Paper purchased for Sake of Coupon—Ready Money Football Betting Act, 1920 (10 & 11 *Geo.* 5, *c.* 52), *ss.* 1, 2.

The appellants published weekly a small eight-paged paper at the price of sixpence. Each copy contained a coupon, upon which readers were requested to forecast the results of certain football matches, a pecuniary prize being offered for correct forecasts. The justices found as a fact that the vast majority of the purchasers of the paper purchased it for this football coupon:—

Held, that this constituted the publishing of a coupon of a ready money football betting business contrary to the Ready Money Football Betting Act, 1920.

Caminada v. *Hulton* (1891) 60 L. J. (M. C.) 116 distinguished.

Strang v. *Brown* 1923 S. C. (J.) 74 approved.

CASE stated by Ipswich justices.

The appellants, Bertie Suttle and others, were convicted on April 30, 1925, on two informations preferred by the respondent, Detective-Inspector Cresswell, for unlawfully publishing or causing to be published a coupon of a ready money football betting business called the Premier Sporting Times, contrary to the Ready Money Football Betting Act, 1920 (10 & 11 Geo. 5, c. 52).

The following facts were proved or admitted:—

The Premier Sporting Times was published regularly every week throughout the year at the price of sixpence. The weekly circulation during the winter months, when football was played, was 32,000 to 33,000, but during the summer months, when the paper contained racing news only, its weekly circulation was from 8000 to 9000 only. The appellants were the proprietors, and were responsible for its publication on March 23 and 28, 1925. The issues on those dates each consisted of an eight-side pamphlet or paper, 9 inches by $5\frac{1}{2}$ inches, and each contained racing notes on pp. 1 and 2, football notes on p. 3, racing hints and selections on pp. 4 and 5, a football article on p. 6, the weekly skill contest and free football competition with coupon on p. 7, and (in the publication of March 28) the results of certain football matches and

information regarding a free accident insurance for footballers on p. 8. Each coupon on p. 7 contained particulars of ten football matches to be played on a future date, with columns in which the competitor was to enter his forecast of the results of the matches. A prize of 150*l.* was offered for a correct forecast of the results of all the matches, and a prize of 100*l.* for a correct forecast of the results of nine of the matches. No money was to be sent with the coupons. Competitions on exactly similar lines for which large prizes were offered were to be found in many newspapers which were published daily for one penny, and which contained, in addition, all the general news to be found in an ordinary daily newspaper. The justices found that the vast majority of the purchasers of the Premier Sporting Times purchased it for the football coupon.

On behalf of the appellants it was contended that the above facts disclosed nothing in the nature of betting or a betting business, and that the appellants were merely conducting a competition for the benefit of their readers, and that there was no evidence upon which the justices could find that purchasers bought the paper not for the paper itself but for the coupon.

The justices were of opinion that the publication, circulation and purchase of the Premier Sporting Times constituted a ready money football betting business within the meaning of the Act of 1920, and convicted the appellants, but stated this case.

C. E. Rochford for the appellants. The conviction was wrong. In order that it can be sustained it is necessary that the facts disclose a bet. The facts only show that this was a skill competition for the benefit of the readers of the paper. The facts in *Caminada* v. *Hulton* (1) were similar to those of the present case. There a weekly pamphlet contained a coupon to be filled in with the names of horses selected by competitors as probable winners of races, pecuniary prizes being offered. It was held by a Divisional Court that this did not constitute betting. Again in *Stoddart* v. *Sagar* (2)

(1) 60 L. J. (M. C.) 116.

(2) [1895] 2 Q. B. 474.

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the facts were similar to those in *Caminada* v. *Hulton* (1), with the additional fact that competitors had to send in one penny with each coupon after the first one. Nevertheless the Court held that this did not constitute betting. On the facts in the present case there was no betting, because as a result of the competition the appellants would make a profit whatever the results of the matches. *Strang* v. *Brown* (2), a Scotch case under the Act of 1920, is against the appellants' contention, but is not binding on this Court.

[*Carlill* v. *Carbolic Smoke Ball Co.* (3) was also referred to.]

R. O'Sullivan for the respondent. The conviction was right. This case is distinguishable from *Caminada* v. *Hulton* (1), because there the money was paid for the paper itself, while it is found in the present case that it was paid for the coupon—that is, the chance of winning the prize—a conclusion of fact amply supported by the facts of the comparatively large sum paid for this small paper and the nature of its contents other than the coupon. *Caminda* v. *Hulton* (1) was distinguished on this ground in *Reg.* v. *Stoddart.* (4) In *Stoddart* v. *Sagar* (5) all the Court did was to decide that there were materials to support the alderman's findings and to refuse to send the case back to him. The facts in *Reg.* v. *Stoddart* (4) were similar to those in *Caminada* v. *Hulton* (1), with the additional fact that competitors had to send in one penny with each coupon after the first, and this was held to constitute betting. Similarly, in the present case money—namely, the difference between sixpence and the normal price of such a paper—was sent in with the coupon. In effect the bet in each case was 150*l.* to a sum approximating 6*d.* against a reader naming the winning teams. *Strang* v. *Brown* (2) is practically identical with the present case, and was rightly decided.

[*Hawke* v. *Hulton* (6) was also referred to.]

LORD HEWART C.J. In my opinion it is clear that this appeal ought to be dismissed. A ready money football

(1) 60 L. J. (M. C.) 116.
(2) 1923 S. C. (J.) 74.
(3) [1892] 2 Q. B. 484.
(4) [1901] 1 K. B. 177, 184.
(5) [1895] 2 Q. B. 474.
(6) (1905) 22 Times L. R. 169.

betting business is defined in s. 2 of the Ready Money Football Betting Act, 1920, in these terms: "'Ready money football betting business' shall mean any business or agency for the making of ready money bets or wagers, or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game." It was contended on behalf of the appellants that nothing in the nature of a betting business was disclosed by the facts as found in this case, and that they were really carrying on a business for the benefit of their customers. But on those facts it was far more reasonable to say that there was a betting business, and that it was being carried on by the appellants for their own benefit. On their behalf stress was laid on a series of cases, especially *Caminada* v. *Hulton*. (1) With regard to that case it is enough to say that it was clearly distinguished by the Court for Crown Cases Reserved in *Reg.* v. *Stoddart* (2), where Lord Alverstone said: "The case of *Caminada* v. *Hulton* (1) is distinguishable on the ground that prima facie the consideration for which the purchaser of the newspaper paid his money was the newspaper itself, and there was no finding that it was in fact paid for the purpose of getting the benefit of the coupon." Those observations are applicable a fortiori in distinguishing between *Caminada* v. *Hulton* (1) and the present case. Here this small pamphlet was sold at sixpence, and the justices were of opinion, as they could not fail to be, that purchasers bought it for the sake of the coupon. In *Stoddart* v. *Sagar* (3) the question was whether there was evidence to support the alderman's findings, and the Court declined to send the case back to be reconsidered. A case with far more bearing on the question before us is the one I have already referred to: *Reg.* v. *Stoddart*. (4) In that case the defendant was the occupier of an office and the proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition"—that is to say, of a promise

(1) 60 L. J. (M. C.) 116.
(2) [1901] 1 K. B. 177, 184.
(3) [1895] 2 Q. B. 474.
(4) [1901] 1 K. B. 177.

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Lord Hewart C.J.

by the defendant to pay a specified sum of money to such persons as should correctly guess the result of a certain horse race, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled in to the defendant's office, together with the sum of one penny for each guess made. A large number of people every week sent in coupons so filled in, accompanied by remittances of money. On those facts the defendant was convicted of betting. Lord Alverstone said (1): "I am not able to see the distinction, for the purposes of this section [s. 1 of the Betting Act, 1853 (16 & 17 Vict. c. 119)], between the transaction with which we have to deal and ordinary betting. The person who pays the extra pence does so because the person to whom the money is paid comes under a promise to pay a certain sum if the horse named by the person sending in the coupons wins the race. That seems to me to fulfil all the conditions which go to make up a bet." Wills J. used words to the same effect (2): "This is about as clear a case of betting pure and simple as can well be conceived." Reference has also been made to the Scotch case of *Strang* v. *Brown* (3), in which the facts were very similar to those in the present case. Lord Hunter said (4): "You have a very large number of people in populous parts of Scotland subscribing their twopences. They are not doing that for anything of value on the paper they are getting, but in the expectation that, if they are correct in naming the winners of a certain number of football matches, and further if they are successful in indicating the number of points by which the successful teams will win, they will receive a large sum in return. Strang collects all the money himself. But, if you consider any particular individual, Strang has in fact made a promise to that individual that a sum largely in excess of the twopence will be given, if that person is successful in naming the winners and otherwise predicting the result of the game. I cannot see that that is anything other than a bet. It is a promise

(1) [1901] 1 K. B. 183, 184.
(2) Ibid. 185.
(3) 1923 S. C. (J.) 74.
(4) Ibid. 78, 79.

by Strang to pay upon the occurrence of an uncertain event. And, therefore, I think that the sheriff-substitute was justified in reaching the conclusion which he did reach, that it was a ready money football betting business that was being conducted by Strang."

In the present case Mr. Rochford for the appellants proposes, not without ingenuity, to examine the transaction at the last moment when the appellants have collected all the sixpences, and contends that because it is then clear that they are bound to make a profit in any event there is no bet. If that were so the promoters of schemes of this kind would be in a very strong position. That, however, is not the moment at which the true nature of the transaction is to be analysed. The transaction arises the moment the first purchaser pays his sixpence. From that moment the appellants run the risk of having to pay the prize, and they take their chance of any further sixpences being received. The argument put forward on behalf of the appellants would apply equally to any bookmaker who had so contrived to make his bets as that in any event he must be in pocket.

We have also been referred to the case of *Hawke* v. *Hulton* (1), an important case, in which the limitations of *Caminada* v. *Hulton* (2) were pointed out. In *Hawke* v. *Hulton* (1) the matter was remitted to the magistrate. In the present case the justices came to the conclusion, as they were bound to do, that the Premier Sporting Times was purchased by the vast majority of purchasers for the football coupon, and that the publication, circulation and purchase thereof constituted a ready money football betting business. It is a typical case of the mischief against which this Act is directed, and for these reasons the appeal must be dismissed.

AVORY J. I agree that this appeal must be dismissed. It is worth noticing that the conviction is under an Act which, as its title shows, is intended " to prevent the writing, printing, publishing, or circulating in the United Kingdom of advertisements, circulars, or coupons of any ready money football

(1) 22 Times L. R. 169. (2) 60 L. J. (M. C.) 116.

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betting business." It is obvious that the Act does not relate merely to ordinary betting slips, and looking at the definition of ready money football betting business in s. 2 of the Act, it is clear that it covers both parts of s. 1 of the Betting Act, 1853, which provided: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise. . . . ." Mr. Rochford, for the appellants, has strenuously argued that the facts of the present case do not disclose a ready money betting business, and the only way in which he can get rid of *Reg.* v. *Stoddart* (1) is by saying that that case was decided under the second part of s. 1 of the Act of 1853. Of the five judges in that case, two had no doubt that the transaction amounted to ready money betting, and the other three expressed no opinion on the point; but they all agreed that the case fell within the second part of the section. It is clear that the Act which we are now construing covers both the first part and the second part of the older section, and that being so *Reg.* v. *Stoddart* (1) is an authority in point. As the justices have found that the great majority of the purchasers bought this paper for the sake of the coupon, that fact is sufficient to bring this transaction within the definition of a ready money football betting business in s. 2 of the Act of 1920.

I concur in all my Lord has said regarding *Caminada* v. *Hulton* (2) and *Stoddart* v. *Sagar* (3), only adding that Wright J.

(1) [1901] 1 K. B. 177. (2) 60 L. J. (M. C.) 116. (3) [1895] 2 Q. B. 474.

in *Stoddart* v. *Sagar* said (1): "No doubt it is possible that under certain circumstances such a competition as this may be a betting transaction, for a case can be suggested where the facts might be so found as to show that it was. For instance, if it were found that a place was used for the purpose of money being received as the consideration for a promise to pay money on an event or contingency of or relating to a race, that might amount to a finding that the contract was a wagering contract, and the Betting Act might be held applicable." Here we have the very thing at which the Act of 1920 was aimed, and I agree that the appeal should be dismissed.

SANKEY J. I agree. I attach considerable importance to the title of the Act: "An Act to prevent the writing, printing, publishing, or circulating in the United Kingdom of advertisements, circulars, or coupons of any ready money football betting business," and s. 1, which imposes the penalty, follows those words. Sect. 2 contains the definition of a ready money football betting business, and I think the words used point to a state of things quite different from ordinary street betting. What we have to decide is whether there was any evidence to support the findings of the justices. We have a number of facts—the size of the paper, its price, and the time of publication, which they were entitled to take into consideration. I agree with my Lord that this is a typical case, and with my Lord and with Avory J. in what they have said as to *Caminada* v. *Hulton* (2); *Reg.* v. *Stoddart* (3); and *Stoddart* v. *Sagar* (4), and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Shirley W. Woolmer.*

Solicitors for respondent: *Field, Roscoe & Co., for Aldous & Gotelee, Ipswich.*

(1) [1895] 2 Q. B. 481.
(2) 60 L. J. (M. C.) 116.
(3) [1901] 1 K. B. 177.
(4) [1895] 2 Q. B. 474.

W. L. L. B.

C. A.
1925
Dec. 1, 4.

[IN THE COURT OF APPEAL.]

BENNETT *v.* STUBBS.

[1925. B. 4540.]

Practice—Action by Money-lender—Application for Judgment under Order XIV. *—Principal repaid in full—Sole Issue as to Rate of Interest—Interest alleged to be excessive—Harsh and unconscionable Transaction—Short cause list—Money-lenders Act,* 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1.

Where in an action by a money-lender to recover money lent with interest it appears that the whole of the principal has to be repaid with interest thereon at the rate of 75 per cent. and that the sole issue is whether the interest claimed is so excessive as to render the transaction harsh and unconscionable within the Money-lenders Act, 1900, the case cannot be entered for trial in the short cause list under Order XIV.

Wells v. *Allott* [1904] 2 K. B. 842; *Dott* v. *Bonnard* (1904) 21 Times L. R. 166; *Tumin* v. *Levi* (1911) 28 Times L. R. 125; and *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* [1912] 1 K. B. 259 followed.

Order of Finlay J. varied.

APPEAL from a decision of Finlay J. in chambers.

The action was brought by the plaintiff, a registered money-lender, on a promissory note for 350*l.* dated April 1, 1925, and payable by six monthly instalments of 58*l.* 6*s.* 8*d.* each, commencing on May 1, 1925. The writ was issued on October 15, 1925, and from the particulars endorsed thereon it appeared that the defendant had paid five of the instalments, amounting together to 291*l.* 13*s.* 4*d.*, and that the claim made was in respect of the sixth instalment of 58*l.* 6*s.* 8*d.* and 1*l.* 0*s.* 11*d.* for interest, making a total of 59*l.* 7*s.* 7*d.*

On October 29, 1925, the plaintiff issued a summons under Order XIV. for liberty to sign final judgment against the defendant for the amount endorsed on the writ, with interest, if any, and costs.

The defendant, by his affidavit in opposition to the summons, denied that he was indebted to the plaintiff in any sum whatever, and alleged that, on the contrary, upon the transactions between them being reopened a substantial sum would be directed to be paid back to him by the plaintiff. He further alleged that with regard to the present

transaction the plaintiff only purported, in fact, to advance him in cash 250*l.*; that he had already repaid that sum with interest thereon at the rate of 75 per cent. per annum; that the total amount for which the plaintiff gave him credit was 291*l.* 13*s.* 4*d.*; that he had carefully calculated the rate of interest, and that it figured out as above—namely, that he had repaid the plaintiff the whole of his alleged advance, together with interest thereon at the rate of 75 per cent. per annum; that nevertheless the plaintiff claimed that he was still indebted to him in a further sum which would make his claim for interest amount to the rate of 200*l.* per cent. per annum or thereabouts. That rate, he submitted, was grossly unfair, unreasonable and unconscionable. He therefore submitted that if the present claim, on the facts admitted by the plaintiff, stood alone he should be entitled to defend the action. He further alleged that the plaintiff had on a previous occasion advanced him 250*l.*, which he had repaid together with 100*l.* for interest, and that he had calculated the rate of interest and found that he had paid on that previous transaction to the plaintiff interest at the rate of over 200 per cent. per annum, and that he therefore desired to counterclaim in these proceedings with a view to such previous claim as well as the present one being reopened so that the interest might be fixed at 50 per cent. per annum on both loans, and that he might recover back from the plaintiff all sums that he had paid beyond the amount actually advanced by the plaintiff and interest at the rate of 50 per cent. per annum thereon.

On November 6, 1925, the summons was heard before Master Jelf, who made an order in the Form No. 7A of App. K to the Rules of the Supreme Court (Order under Order XIV., No. 2A) that the defendant should be at liberty to defend the action, but refused to remit it to the Westminster County Court as asked. Instead thereof he ordered that the action should be entered for hearing in the short cause list, and gave the usual directions as to the delivery of defence and counterclaim or particulars of defence and counterclaim, and for the exchange of list of documents.

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The defendant appealed to the judge, and asked that the order might be amended or varied by ordering that the action should be remitted to the Westminster County Court instead of being entered in the short cause list.

On November 20, 1925, the appeal was heard by Finlay J. in chambers, who, in dismissing it, said that the case was "just on the line," and that he did not feel he ought to interfere with the Master's discretion.

The defendant appealed.

C. F. Entwistle for the appellant. This action is wholly in respect of interest, the defendant having paid the whole of the loan of 250*l.* together with interest at the rate of 75 per cent. per annum before action brought. The further amount now claimed would make the interest on the loan about 200*l.* per cent. per annum. The Masters, notwithstanding the views expressed by the Court of Appeal in *Tumin* v. *Levi* (1), have apparently adopted a practice of directing these money-lending cases to be entered in the short cause list, thereby giving the money-lender claiming an excessive rate of interest an advantage over ordinary creditors.

This is not a proper case to be tried under Order XIV. at all, and there is no jurisdiction in the Court to order a case to be entered in the short cause list under that Order where the only issue to be tried is as to the amount of interest to be allowed. This clearly appears to be the law from the dicta of the various judges in *Wells* v. *Allott* (2); *Tumin* v. *Levi* (3); and *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* (4)

Further, having regard to the amount in dispute, the case ought to be remitted to the county court for trial.

R. F. Levy for the respondent. None of the authorities cited have any application to the present case. *Tumin* v. *Levi* (1) was an entirely different case. There the borrower had brought an action in the Chancery Division claiming an account and a declaration that the money-lending

(1) 28 Times L. R. 125.
(2) [1904] 2 K. B. 842, 846.
(3) 28 Times L. R. 125, 127.
(4) [1912] 1 K. B. 259, 264, 266.

transactions were harsh and unconscionable, and the money-lender had thereupon commenced an action in the King's Bench Division on the promissory note, and it was held that that was an abuse of the process of the Court.

There is here nothing to prevent interrogatories being administered notwithstanding that the case is entered in the short cause list. The defendant, if he so desires, is entitled to put forward a counterclaim. Every defence is there open to him.

As to the question of remitting the case to the county court, the County Courts Act, 1919, leaves the matter entirely in the judge's discretion. As regards the question of costs the plaintiff is willing to undertake that if the case is retained in the High Court his costs of action shall not exceed those which would be allowed by the county court scale and in any event shall not exceed 40*l.* If the case is retained in the High Court it will be heard more expeditiously than if remitted to the county court and at least as cheaply. Here the case has been decided by a very experienced Master and the judge has refused to interfere with the exercise by the Master of his discretion. This Court will therefore not interfere unless it is satisfied that both the Master and the judge proceeded upon a wrong principle. There is no ground for remitting the case to the county court. The only object of the defendant in seeking to have it remitted is to cause delay. There is no bona fide ground for the present application.

C. F. Entwistle replied.

Cur. adv. vult.

Dec. 4. POLLOCK M.R. This is an action brought by the plaintiff on a promissory note for 350*l.*, and the claim endorsed on the writ shows that after credit has been given for 291*l.* 13*s.* 4*d.* there remains a balance owing of 59*l.* 7*s.* 7*d.* and no more. The plaintiff took out a summons for liberty to sign final judgment under Order XIV., and the defendant by his affidavit in opposition set up the defence that he had already repaid the whole of the principal sum which had been lent

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together with interest at the rate of 75 per cent., and that the sum sued for represented the difference between interest at the rate of 75 per cent. and 200 per cent. He also set up the defence that the bargain was harsh and unconscionable under the Money-lenders Act, 1900. It appears that on a previous occasion the defendant obtained a loan of 250*l.* from the plaintiff, which he repaid together with 100*l.* for interest, and that the defendant calculated that the rate of interest he had paid on that transaction amounted to 200 per cent. per annum, and he claimed to be entitled to reopen both these transactions. The order made by the Master was that the defendant should have leave to defend and that the action should be entered in the short cause list. Inasmuch as the order was made by the Master in the form No. 2A and not in the form No. 2, the defendant appealed to the judge and asked that the action might be remitted to the Westminster County Court instead of being entered in the short cause list. Finlay J., before whom the matter came, dismissed the appeal and left the case to go into the short cause list. From that order the defendant has appealed, and asks that the action may be remitted to the county court and not entered in the short cause list.

Upon the hearing before us we have had the advantage of hearing good arguments on both sides. It is clear upon the authorities that where in a money-lender's action the only question in issue is the rate of interest to be allowed the case is outside Order XIV. altogether and cannot, therefore, be entered in the short cause list. That appears from *Wells* v. *Allott* (1), where Collins M.R. said: "The procedure under Order XIV. is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence. But where in a particular class of case a special jurisdiction is given to the Court by the Money-lenders Act, 1900, to determine whether the plaintiff is entitled in the circumstances to recover what is a primâ facie debt, it seems to me to be clear that that class of case is taken out of Order XIV." That principle

(1) [1904] 2 K. B. 842, 846.

seems to stand good at the present time. In *Dott* v. *Bonnard* (1) the principle of *Wells* v. *Allott* (2) was followed. There Mathew L.J., in agreeing with the judgment of Stirling L.J., said that "it did not seem to him to be right in such a case for the Master or judge at chambers to take upon himself the administering of the Money-lenders Act. In the case before them the plaintiff lent sums amounting to 940*l.* to the defendant. He made no charge for interest, but he exacted a bonus, not in money, but in money's worth. The defendant said that that bonus far more than secured the plaintiff, and that it was unreasonable and unconscionable to permit the plaintiff to hold it. The case was not one for Order XIV. at all." That case was followed by the Court of Appeal in *Tumin* v. *Levi* (3), in which Buckley L.J. said: "It would be an abuse of the practice of the Order (Order XIV.) to deprive a litigant of his right of action on the ground that one item of the action fell within the purview of the Order, and he thought such a case was never intended to come into the short cause list," and he cited the statement of Collins M.R. in *Wells* v. *Allott* (4) that "it is impossible now to say that the procedure of Order XIV. can be made applicable to an action by a money-lender to recover interest on money lent, where the loan appears primâ facie to carry an excessive rate of interest." Again in *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* (5), Buckley L.J. said: "Suppose that, the principal having been paid, the only dispute in the action is as to the amount of interest to be paid. The defence raised is that the bargain was harsh and unconscionable; the case is clearly not one for the application of Order XIV."

Those four cases appear to show that the principle laid down in *Wells* v. *Allott* (2) is well understood and should be acted upon. It does not appear to us that either the Master or the judge was considering the exact point which was being sent for trial. We have come to the conclusion that we must deal with this case on the principle established by those cases.

(1) 21 Times L. R. 166, 167.
(2) [1904] 2 K. B. 842.
(3) 28 Times L. R. 125, 127.
(4) [1904] 2 K. B. 842, 846.
(5) [1912] 2 K. B. 259, 266.

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There is another provision in the Rules of the Supreme Court under which a speedy trial can be ordered, and it is to be found in Order XXXVI., r. 1A, which provides: "On the hearing of a summons under Order XIV. . . . . it shall be lawful for the Court or judge if it appears that the action . . . . is one which ought to be tried at an early date to certify that the same should be tried speedily and to fix the mode of trial." That procedure was not invoked or followed here.

In the present case it is clear that the real issue between the parties is what are their respective rights having regard to the Money-lenders Act. The plaintiff has given an explicit undertaking that if the case remains in the High Court his costs shall not exceed the sum which would have been allowed if the action had been tried in the county court, and shall not in any event exceed 40*l.* The defendant is therefore safeguarded against excessive costs. We therefore think that the case need not be sent to the county court, and the appeal as to that point must fail.

But it is also plain that the case is not one that ought to be entered in the short cause list under Order XIV. The defendant must have a full opportunity of putting forward his defence, and if he should think fit, his counterclaim. It does not appear to us that the case is one which requires a speedy trial, and we will discharge the order for trial in the short cause list.

The result therefore is that the appeal partly fails and partly succeeds. The case is one in which proceedings ought not to have been taken under Order XIV., and they were misconceived. The costs here and before the judge and Master will be the defendant's costs in the action. If he succeeds he will get those costs, and if he does not succeed he will not. There will be no order as to the plaintiff's costs.

SARGANT L.J. I agree.

Order varied.

Solicitors for appellant: *Cohen & Cohen.*

Solicitors for respondent: *Davis & Taylor.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1925
Nov. 20.

HUTCHINSON *v.* KIVETON PARK COLLIERY COMPANY, LIMITED.

Workmen's Compensation — Injury by Accident—Cesser of Incapacity — Subsequent fresh Injury — Contributing Cause to further Incapacity — Claim for Compensation in respect of original Accident — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

On July 4, 1924, a workman whilst employed in the respondents' mine slipped and injured his knee, and was away from work for seven weeks, during which time he was paid compensation by the employers. On August 19, 1924, he returned to his original employment, and remained at work until April 6, 1925. On the latter date, whilst crossing the yard at his own home he again slipped and injured the same knee, and was away from work until June 8, 1925. In arbitration proceedings the workman claimed compensation for the period between April 6 and June 8, 1925. The county court judge found that the workman having returned to full work his knee had fully recovered from the first accident; that he had a normal knee during the time he was doing full work; that the second accident was not directly caused by the first accident; that he had a "knee liable to slip"; and he accordingly held that the injury caused by the second accident was not an injury by accident arising out of the employment. On appeal:—

Held, that the question whether the incapacity was the result of the first or the second accident was entirely a question of fact to be determined by the county court judge on the evidence before him, and that there being evidence to support his findings the Court would not interfere.

Noden v. *Galloways, Ld.* [1912] 1 K. B. 46 and *Roberts* v. *Broughton, &c., Colliery Co.* (1921) 14 B. W. C. C. 186 followed.

Brown v. *George Kent, Ld.* [1913] 3 K. B. 624; *Williams* v. *Graigola Merthyr Co.* (1924) 17 B. W. C. C. 202 distinguished.

APPEAL from an award of the judge of the Worksop County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The applicant, John Hutchinson, was a coal miner, and on July 4, 1924, whilst engaged in getting coal in the respondent's mine he slipped on a flat sheet and injured his knee by dislocating the semi-lunar cartilage. He was off work for seven weeks and three days—from July 4 to August 19, 1924—during which time he was paid compensation by the respondents. On August 19, 1924, he returned

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to his old work, but, according to his evidence, although the knee was normal to outward appearance, it was weak and gave him pain, and he used to have it massaged every fortnight or oftener, if necessary, and that this treatment enabled him to remain at his old work. He continued to work for thirty-three weeks and three days—from August, 1924, to April 6, 1925. On April 6, 1925, his knee, as he alleged, hurt him, but he went on with his work, and in the evening, as he was walking across the yard at his home, he slipped, and again dislocated the cartilage of the same knee. The yard was rough and unpaved, and it was a wet night. As a result of this accident he was incapacitated for work for nine weeks —from April 6 to June 8, 1925. There was practically no dispute as to these facts. In the arbitration proceedings the applicant claimed compensation at the rate of 30*s.* per week for the period between April 6 and June 8, 1925. The respondents admitted that there was total incapacity during that period, and that if they were liable, the applicant was entitled to compensation during that period. At the hearing the respondents called no evidence, but relied on *Noden* v. *Galloways, Ld.* (1), and *Roberts* v. *Broughton, &c., Colliery Co.* (2), and similar cases.

The county court judge made his award in the following terms: "In this case I came to the conclusion that the applicant having returned to full work, his knee had fully recovered, as the doctor said it was normal. I did not accept the evidence of the applicant and his masseur as to its condition during the time he was at work. He had a normal knee all the time and was doing full work. He slipped the cartilage owing to an accident in his backyard. This had nothing to do with his work. The accident was not directly caused by the accident in July. He had a knee liable to slip. I could not find that the injury was caused by an accident arising out of his employment. I therefore found for the respondents."

The applicant appealed. The appeal was heard on November 20, 1925.

(1) [1912] 1 K. B. 46. (2) 14 B. W. C. C. 186.

W. Shakespeare and *W. Stewart* for the appellant. The county court judge was wrong in law in holding that the appellant's incapacity for work between April 5 and June 8, 1925, was not due to the accident of July 4, 1924. There was no evidence before him on which he could so find. When a workman meets with an accident from which he recovers so far as physical capacity to work is concerned, but which leaves him in such a condition that he is liable to suffer a recurrence of the injury, or in such a condition that a second accident will set up an incapacity which would not arise in a normal man, the employer is liable, even if the accident happens at the workman's home or elsewhere away from his work. Suppose that a man meets with an accident arising out of and in the course of his employment by which he suffers a slight injury, for instance a slight cut in the finger. That in itself may not be an incapacitating injury, but it is an injury for which the employer is liable. By that slight accident the workman, though not then incapacitated, lays himself open to an attack by a germ which may enter the cut, and cause serious incapacity or even death by blood poisoning. It makes no difference if that germ subsequently enters the cut when the workman is at home or elsewhere away from his work. The employer under such circumstances is liable for the subsequent results. Here the appellant had had an accident whilst in the employment of the respondents, which left him liable to serious consequences from a second trivial accident, consequences which would not have occurred but for the first accident. As the county court judge found: "He had a knee liable to slip." That finding, it is submitted, brings the case within *Brown* v. *George Kent, Ld.* (1) There was here no novus actus interveniens which broke the chain of causation, but the incapacity arose from the original accident.

Noden v. *Galloways, Ld.* (2), upon which the respondents rely, is distinguishable. The Court was there considering a case where the incapacity caused by the first accident had ceased, and unless this Court is prepared to hold that the

(1) [1913] 3 K. B. 624. (2) [1912] 1 K. B. 46.

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incapacity had ceased when the man had so far recovered as to be able to earn his old wages, it does not apply to the present case, by reason of the finding that "He had a knee liable to slip." Here the second accident had the result of aggravating the condition of things which was still existing as the result of the first accident.

[ATKIN L.J. At present I do not quite see why an incapacity should not be due to two accidents.]

The question in all these cases is, is there an unbroken chain of causation? Has the man recovered from the particular injury? To sum up. Where, as here, a man is still suffering from the original injury and incapacity follows, the doctrine of novus actus interveniens has no application. That view is supported by *Brown* v. *George Kent, Ld.* (1) *Noden* v. *Galloways, Ld.* (2), is distinguishable from the present case on the ground that there the man had recovered from the injury.

[*Innes or Grant* v. *Kynoch* (3); *Saddington* v. *Inslip Iron Co.* (4); *Williams* v. *Graigola Merthyr Co.* (5); *Roberts* v. *Broughton, &c., Colliery Co.* (6); *Borland* v. *Watson, Gow & Co.* (7); *Hodgson* v. *Robins, Hay, Waters & Hay* (8); *Lewis* v. *Wrexham and Acton Collieries, Ld.* (9), were also referred to.]

Wingate-Saul K.C. and *Edgar Dale* for the respondents. The question in this case is purely one of fact. If there was evidence on which the county court judge could come to the conclusion he did this Court will not interfere with his finding. There was here, it is submitted, ample evidence on which the county court judge could come to the conclusion he did that the appellant had fully recovered from the original accident.

The present case is entirely different on its facts from *Brown* v. *George Kent, Ld.* (1) In that case there was not as here a novus actus interveniens.

[They were stopped.]

(1) [1913] 3 K. B. 624.
(2) [1912] 1 K. B. 46.
(3) [1919] A. C. 765.
(4) (1917) 10 B. W. C. C. 624.
(5) 17 B. W. C. C. 202.
(6) 14 B. W. C. C. 186.
(7) (1911) 5 B. W. C. C. 514.
(8) (1914) 7 B. W. C. C. 232; [1914] W. N. 47.
(9) (1916) 9 B. W. C. C. 518.

POLLOCK M.R. This case has raised an interesting and important point, and we have had an excellent argument on behalf of the applicant from Mr. Shakespeare. The facts are quite short. It appears that John Hutchinson, the applicant, was a miner, and he had an accident, which caused injury to his knee. That accident took place on July 4, 1924, and it put out his knee and injured the cartilage, with the result that he was unable to go to work. But he received full compensation down to August 17, 1924. On the Monday following, August 19, he was given work, and continued in the employment down to April 6, 1925, a period of over thirty-three weeks. On the evening of April 6, 1925, when he was at home, in crossing his yard he slipped and injured the same knee, with the result that he was away from work for nine weeks, until June 9. He claimed compensation for that period of nine weeks during which he was away from work, and commenced arbitration proceedings to enable him to recover it. Evidence was given before the learned county court judge by three doctors, one of whom stated that the cartilage had been torn off and that the injury might occur again, and "that he did not think that the accident of April 6 would have happened if the accident of July 4 previously had not happened." He added (according to the judge's notes): "If he walks across backyard and slips on something, more likely to do it if original accident." That is, if he walked across the backyard and slipped on something he was more likely to put his knee out in consequence of the original accident. Another doctor stated that he thought the accident in April was a recurrence of the old dislocation. If the knee went out once it was liable to go out again, and the previous injury increased the probability of a further accident The learned county court judge, by his award, found that the knee had fully recovered from the accident of July 4, and that the applicant had been able to do full work as from August 19; that he slipped the cartilage in consequence of a fresh accident on April 6, and that the injury was not directly caused by the earlier accident in July. It is true he also found that the applicant had a

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knee liable to slip, but he added in conclusion upon the whole of the evidence: "I could not find the injury was caused by an accident arising out of his employment."

It is perhaps unnecessary to repeat that a workman's right to recover depends upon his satisfying s. 1 of the Act of 1906 and the Schedule that follows. The words of s. 1, sub-s. 1, are: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." Under the Schedule the employer is liable to pay compensation during the period of the resultant incapacity, but the workman has to show that the accident arose out of and in the course of the employment whereby personal injury is suffered by him. Taking the facts as I have recounted them, it is plain that the accident that happened to him in his own backyard on April 6 was not an accident which immediately arose out of and in the course of the employment, because at that moment he was not exercising the employment of his employer. But it is said that there was sufficient evidence connecting the accident of April 6 with the original accident which befell him in the previous July to justify his claim for the incapacity during the nine weeks, and attention is drawn to the evidence which I have mentioned given by the doctors as to the man's proneness to slip and to suffer dislocation of the knee after the original accident. Mr. Shakespeare has called our attention to, and has suggested that he must bring himself within the decision in *Brown* v. *George Kent, Ld.* (1), and that if he does so he will be entitled to recover, although he admits, on the other hand, that if the case falls within the decision in *Noden* v. *Galloways, Ld.* (2), he will not be entitled to recover.

I do not think the principle in *Brown* v. *George Kent, Ld.* (1), is one which affords a true test in this case. In that case the man was injured, and in consequence of the injury he went into hospital, and in consequence of the

(1) [1913] 3 K. B. 624. (2) [1912] 1 K. B. 46.

injury which led him to go into the hospital he had to suffer an operation, and while he was in the hospital he caught scarlet fever, and that fever aggravated his condition. It was contended that the scarlet fever was what is called —I do not know why the Latin is used and not the English—a novus actus interveniens, so as to separate the facts which took place before the scarlet fever supervened from the facts and consequences later in date when the scarlet fever supervened. But it was held there that the injury from which the man suffered and which had brought him to the hospital was one which was still in operation, and that the scarlet fever did not act as a novus actus interveniens to cut off or make less effective the original cause from which the man went to the hospital.

So also in *Williams* v. *Graigola Merthyr Co.* (1) before this Court this doctrine of novus actus interveniens was again suggested. That was a case in which the man had suffered an injury owing to a mistake on the part of his wife, causing further injury to the knee, which had already been injured, and then when he went into the hospital the knee had to be lanced, and that gave access to certain germs and enabled them to get into the part lanced, with the result that tetanus was set up and the man died. In both those cases, be it observed, the man was in hospital suffering from the actual accident which had originally brought him there, and the only question that arose was whether the superadded consequences, which were not necessarily the consequence of the immediate accident from which he suffered, formed a novus actus interveniens and made a separation between the original cause which had taken him to the hospital and the ultimate result to him.

In *Williams* v. *Graigola Merthyr Co.* (2) I referred to what Collins M.R. said in *Dunham* v. *Clare* (3), and I think it is not unimportant to repeat his words. His Lordship said: "If the chain of causation is broken by a novus actus interveniens, so that the old cause goes and a new one is substituted for it,

(1) 17 B. W. C. C. 202. (2) 17 B. W. C. C. 202, 207.
(3) [1902] 2 K. B. 292, 296.

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that is a new act which gives a fresh origin to the after-consequences." I point out that there Collins M.R. does not merely say that after a novus actus interveniens a new cause is substituted, but that the old cause goes; and I think he used the phrase advisedly in order to show that it is not sufficient merely for the novus actus interveniens to come in with a new cause, but that if you are going to get the benefit of the novus actus interveniens it must be by displacing the old cause.

I have referred to those cases because our attention has been drawn to them. In the present case the man was not in hospital, and he had been back at his work and had recovered from the injury to his knee, but the injury had left some supervening weakness, with the consequence that the cartilage of the knee would be more likely to slip again.

It is not conclusive against the workman that the injury should have taken place, not upon the employers' premises, or indeed arising out of circumstances immediately connected with the actual work which it would be his duty to perform. That appears from *Hodgson* v. *Robins, Hay, Waters & Hay.* (1) In that case a charwoman had been rendered somewhat lame in consequence of an accident which took place on her employers' premises, and the lameness continued, and she slipped at home in her own kitchen, and when the learned county court judge found that there was sufficient evidence to justify him in holding that the accident at home was the consequence of the original accident in her employer's premises, the Court held that they could not set aside that finding.

On the other hand, in *Noden* v. *Galloways, Ld.* (2), a man had met with an accident which necessitated the amputation of the index finger of his right hand. Some years afterwards he had another accident, but upon the evidence which was before the learned judge it appeared that the second accident arose not out of the fact that he had lost the index finger of his right hand, but out of the fact that there was some inflammation caused by or arising from a piece of dead

(1) 7 B. W. C. C. 232; [1914] W. N. 47. (2) [1912] 1 K. B. 46.

or diseased bone of the hand, which was not due to or caused by the amputation of the index finger. The Court of Appeal held that there was no evidence to show that the original accident was a contributory cause of the present incapacity, and it set aside the award which had been given in favour of the man. That again was not a case of novus actus interveniens, but of whether or not the accident originally suffered operated to or could be so connected with the more recent fact as to justify a claim by the workman arising from having suffered injury by an accident arising out of and in the course of his employment.

Again in *Roberts* v. *Broughton, &c., Colliery Co.* (1), a collier had a leg fractured by an accident in May, 1919, and was paid compensation for a time and returned to his work. About a year and a half afterwards he was walking across a common not in the course of his employment, when he trod on a stone and fell, breaking his leg again in the same place. It was found that the original accident had set up a weakness in the leg at a certain point where the fracture had taken place, and there was evidence that in the second accident the injury to the leg took place exactly at the same point and along the same line as the first. The county court judge came to the conclusion that the applicant had recovered before the second accident, but that there was some weakness remaining after the first accident which contributed to the second, and also that the fact that the injury took place in the same place was probably due to the supervening weakness caused by the first accident. But he held that the accident, although it contributed to the second, did not in law render the respondents liable to compensate the applicant on account of the second incapacity, and he made an award in favour of the employers. That case was reviewed in this Court, and the Court refused to interfere with the finding of fact. Lord Sterndale M.R. said (2): "Before his" (the county court judge's) "judgment he had said this: 'There must have been some weakness after the first accident, or the second fracture would not have been along the same line

(1) 14 B. W. C. C. 186.

(2) 14 B. W. C. C. 186, 189.

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as the first, which is unusual.' He does not find that the second fracture would not have occurred at all, but would not have been in that particular line. But then there come these important findings, in fact they are vital findings, 'that if the second accident of October, 1920, had not occurred, the applicant would not be suffering any incapacity in doing his full ordinary work, and that he had done so for several months prior to the second accident. That the present incapacity of the applicant is attributable only to the accident of October, and not to the accident of May, 1919.'" That case shows that in the opinion of the Court of Appeal this question whether or not you are to refer the condition of the workman to the second or the first accident lies in the sphere of the evidence before the county court judge, and in respect of it the county court judge is the proper judge and not the Court of Appeal.

I have taken those two cases of *Hodgson* v. *Robins, Hay, Waters & Hay* (1) and *Roberts* v. *Broughton, &c., Colliery Co.* (2), which show different findings of fact by the learned county court judge, which the Court of Appeal refused to set aside, and I have done so for this reason: that I wanted to point out that there may be facts which will enable the judge to connect the later facts with the earlier accident, or there may be facts which compel the county court judge to hold that there is no connection between the later facts and the earlier accident. I am very reluctant to give any sort of direction or indication which might tend to show that as a matter of law there could not be a claim in the case of a second accident after a first accident or to suggest that there may not be cases in which the second accident or the effect of the second accident ought to be attributed to the first accident rather than the second. It appears to me that these matters belong to the sphere of evidence. The learned county court judge in this case has applied his mind carefully to the evidence before him. He has found that the injury was not directly caused by the accident in July, 1924. It seems to me clear that he has not misdirected himself. It was for

(1) 7 B. W. C. C. 232; [1914] W. N. 47. (2) 14 B. W. C. C. 186.

him to determine this question of fact. He has done so, and I think this Court ought not to interfere with his decision.

For these reasons I am of opinion that the appeal must be dismissed with costs.

ATKIN L.J. This is one of a class of cases which in my experience are not of infrequent occurrence, where a workman meets with two accidents at different periods, and the question arises whether his incapacity is the result of the first or the second accident. I feel that if this Court or the ultimate tribunal were able to give some useful guidance to those who have to administer the Act it would be of considerable value. My own view on considering the Acts and the cases is that the question to be resolved is really not one of law but of fact, and that it is a question of fact in each case whether the incapacity in respect of which the claim is made is or is not the result of the accident in respect of which the compensation is claimed. It is useful, of course, and indeed I think it is the duty of everybody who has to administer this Act to keep his mind upon the actual terms of the statute, which shows the true liability. The only provisions of the Act of 1906 to which one need refer are s. 1 and Sch. I. Sect. 1 provides that "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The material words there are "personal injury by accident" and "caused to a workman." Sch. I., para. 1 (*b*), says: "where total or partial incapacity for work results from the injury a weekly payment during incapacity" shall be paid, and therefore apparently what you have to consider is: Is there a total or partial incapacity for work resulting from the injury which has been caused to the workman by the accident? In this case, as in the class of cases I am considering, there can be no question that there have been two accidents to the workman, because in the first instance, in 1924, he slipped on the employers' premises and dislocated the cartilage of

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the knee, and that undoubtedly was an accident; it arose out of and in the course of the employment, and it caused injury, and the injury caused incapacity. The incapacity ceased, and he returned to work, but in 1925 he met with a precisely similar accident, this time in his own home. He slipped again, and again he dislocated the cartilage of his knee, and again he was incapacitated for work for some time. The real question is whether or not the second incapacity in 1925 resulted from the first accident in 1924. I find it very difficult to lay down as a proposition of law that where there are two accidents the injury which in one sense is the consequence of the second accident may not in law be the result of the first accident. With reference to that I should like to refer quite shortly to one or two of the cases in which compensation has been awarded to workmen who have received an abrasion either in the course of their employment or out of it, and have been incapacitated by reason of some poisonous bacillus entering into the body through that abrasion.

There are two cases that I wish to refer to. One is *Innes or Grant* v. *Kynoch* (1) in the House of Lords, where it was asserted that the entry of the bacillus into the abrasion was an accident. That was a case of a workman who had been employed in a manure factory in handling and bagging bone manure. It was found that the "death was due to infection from germs known as streptococci and staphylococci. Such germs were found to exist in great numbers in the bone dust handled by the deceased, but there was evidence that they also existed to a much lesser degree almost anywhere. The point of infection was a scratch on the leg, the origin of which was unexplained." The Sheriff-Substitute having drawn the inference that the infection was derived from the germs in the bone dust, held that the death resulted from an accident arising out of and in the course of the employment. The Court of Session reversed that decision on the ground that there was no evidence on which the Sheriff-Substitute could so find, but their decision was reversed by

(1) (1919) 12 B. W. C. C. 78; [1919] A. C. 765.

the House of Lords. The point of the decision was whether there was evidence to support the finding of the arbitrator, and as to that I do not trouble, but what Lord Birkenhead said was this (1): The applicant "must satisfy the arbitrator that the bacillus infection which is said to constitute the accident invaded his system under such circumstances that accident arose 'out of and in the course of the employment.' Where, as in *Brintons'* (2) and the present case, the bacillus is not met with, or is very rarely met with except among the implements or the materials of the particular employment, the onus which is imposed on the applicant is obviously very much lightened. But where the invading bacillus may be found anywhere—in the train, in the home or in the public-house—a prudent arbitrator will require strict proof such as can hardly in the nature of things be often forthcoming that the 'accident' in fact arose 'out of and in the course of employment.'" I only cite that case for the proposition, which I do not think would be controverted, that an invasion of the body by a bacillus is in itself, or may be in itself, an accident sufficient to entitle the workman to compensation if it arises out of and in the course of the employment.

The result is this: that in a case where a workman has met with an accident in the course of the employment, and the accident is the cause of some abrasion and a bacillus invades the body outside the employment and not in the course of the employment, compensation may still follow. As I have said, the invasion of the body by the bacillus is itself an accident. Hence it seems to follow that in the way in which "accident" is used in the Act of 1906, an injury which is occasioned by an accident happening out of the employment may still give rise to compensation in respect of a previous accident happening in the employment. That I think is established by *Saddington* v. *Inslip Iron Co.* (3), which was cited to us. There "a workman was employed to shovel up and screen calcined ore. It was in the winter, and he had

(1) [1919] A. C. 765, 771. (2) [1905] A. C. 230.
(3) 10 B. W. C. C. 624.

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chilblained or chapped hands. This work caused a frost-crack in his hand to open and bleed so much that he had to get his hand bound up with his handkerchief. On the following day septic poisoning set in, and for a time he was unable to work. The arbitrator found that the work caused the frost-crack to split open, and that the microbes entered while the man was working; that calcined ore dust was liable to render a sore septic, but there being no evidence before him on which he could decide whether the microbes came from the calcined dust, or from the man's handkerchief, or from some other source, he held that the injury by accident was not proved to have arisen out of the employment and made his award for the respondents." I think the headnote correctly states the decision: "*Held*, the finding that the man's work caused the frost-crack to split, amounted to a finding of an accident arising out of his employment. The entry of the germ, and consequent septic condition of the hand was, in the circumstances, a natural consequence of this, and therefore the man's incapacity resulted from the injury, and it was immaterial as to from what the germ had actually originated." I should like to refer to a passage in Scrutton L.J.'s judgment, which seems to me material on this matter. He says (1): "The learned judge, as I understand, has to address his mind on the decisions of this Court, following *Dunham* v. *Clare* (2) and *Ystradowen Colliery Co.* v. *Griffiths* (3), to the question, did the incapacity result from the accident in this sense, not was it the natural and probable consequence. It is enough that it results, although it was not the natural and probable consequence, nor was it the sole and unassisted consequence, for if the accident partially causes the incapacity it does not matter that some other cause has come in and increased the incapacity by acting on the incapacity caused by the accident. It appears to me the latter proposition is laid down most fairly by this Court in its considered judgment in *Brown* v. *George Kent, Ld.*" (4)

(1) 10 B. W. C. C. 624, 634.
(2) [1902] 2 K. B. 292.
(3) [1909] 2 K. B. 533.
(4) [1913] 3 K. B. 624.

On the other hand, you may have to consider the cases where there have been two accidents, and in respect of which either the Court of Appeal has found there was no evidence or the learned judge himself has not been able to find that the first accident was the cause of what I may call the second injury. Those cases are *Noden* v. *Galloways, Ld.* (1), and *Roberts* v. *Broughton, &c., Colliery Co.* (2)

In *Noden* v. *Galloways, Ld.* (1), the facts would appear to admit of very little doubt as to the right conclusion to be drawn. "As result of an accident in 1902, a rivetter had the index finger of his right hand amputated. He returned to work with his old employers, not as a rivetter, the rivetter's hammer being too heavy for him, but as a caulker, at the same wages. He worked at this for seven years without difficulty, using a light hammer. In November, 1910, a pneumatic hammer was adopted for caulking, and after working with this for a few days he had to leave owing to his right hand becoming inflamed." Then it was discovered that the inflammation had been caused by a piece of diseased bone in the metacarpal bone of the index finger, but quite unconnected with the original injury. Therefore all that could be said there was that the original maiming of his hand had caused him to use the pneumatic hammer with more difficulty, and that the pneumatic hammer in that way had caused the injury, and in that particular way the original maiming had contributed to the injury, which otherwise was quite unconnected with it. The learned deputy county court judge found that the accident was a contributory cause of the present incapacity, and held that this sufficed in law to entitle the workman to compensation. The Court of Appeal held there was no evidence upon which it could be so found. Fletcher Moulton L.J., in dealing with the accident and its consequence, said (3): "When you are taking the incapacity which follows when a second cause has intervened, it is, in my opinion, the employers at the time of the intervention of that second cause who are liable for the

(1) 5 B. W. C. C. 7; [1912] 1 K. B. 46.

(2) 14 B. W. C. C. 186.

(3) [1912] 1 K. B. 46, 51.

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whole incapacity. Their liability is not less because the man has brought to his work something which makes an accident more serious than it otherwise would be. I have taken a clear case of two contributing causes, and if the law as laid down to himself by the learned deputy county court judge is right, the workman in such a case could go against the first employer or the second employer, and, for aught I see, against both employers. That is not the law. When a second cause intervenes and produces the incapacity and that second cause is in the nature of an accident, it is the second employer who is liable." He is there dealing with the question as between two employers. It is not quite the same case, but it may be treated certainly as illustrating the question to what extent incapacity is the result. Then he goes on to say (1): "It must not be thought that I hold that if the incapacity develops without the intervention of a second cause of the nature of an accident it at all follows that it cannot be attributed to the original accident." In that case I think what the Lord Justice is thinking of when he speaks of the second cause intervening is this. He means the intervention of a new cause by which incapacity is in the sense of the statute the result. That follows I think precisely the reasoning of Collins M.R. in *Dunham* v. *Clare*. (2) In that view I imagine that there can be no doubt that if you can establish that the incapacity is due to what I prefer to call the new cause rather than the first cause, and is the result of that new cause, then of course you cannot refer it to the first accident. That I think is the case of *Roberts* v. *Broughton, &c., Colliery Co.* (3), which is oddly enough somewhat like the present case. There a workman who had had his leg broken by an accident in 1919 was in 1920 walking across a common, not in the course of his employment, when he trod on a stone and fell, breaking his leg again in the same place. He claimed compensation on the ground that the second accident would not have happened but for the first. The county court judge came to the conclusion that long

(1) [1912] 1 K. B. 52. (2) [1902] 2 K. B. 292.
(3) 14 B. W. C. C. 186.

before the second accident happened the applicant had recovered full capacity, but that there was some weakness remaining after the first accident, which contributed to the second accident. He could not, however, find as a fact that the second accidental injury would not have happened but for such weakness, though that was possible. He held that the incapacity was attributable to the second accident. It was held by the Court of Appeal that there was evidence to support his view and that he had not misdirected himself. As against that, there may be set the case of *Hodgson* v. *Robins, Hay, Waters & Hay* (1), in which it seems to have been held that the judge was warranted in finding that where a charwoman had slipped and lamed herself on the Tuesday, and had gone home and had slipped on her own stairs and broken her leg on the Wednesday or on the same day, incapacity arising from the broken leg could properly be said to be the result of the accident which she had suffered on the first day when she had lamed herself. I think that is a question of fact in each case.

Now it is said that there was evidence in this case from which the learned county court judge could infer that the incapacity in 1925 was not the result of the accident that happened in 1924. I think he was justified in finding that, even though he found, as I think he did find, that the effect of the accident in 1924 was to cause the knee—to use his own words—"to be liable to slip," by which I understand him to mean to cause the cartilage to be more liable to be dislocated. I cannot find that the learned county court judge misdirected himself in respect of this matter, because there is nothing to indicate that he had not all these considerations before him. There was evidence in the case, in the evidence of the doctor, that the injury which had been caused by the accident was, in some sense, subsisting, though I think that probably required further investigation—that the attachment had become torn off. It might well be that the judge might possibly have found, upon that evidence, that the second accident was the result of the first; but if there is evidence

(1) 7 B. W. C. C. 232; [1914] W. N. 47.

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both ways, we cannot interfere with his finding. That seems to me to be the position in this case.

Therefore I can only say that it appears to me that the appeal must fail and must be dismissed with costs.

SARGANT L.J. I am of the same opinion. It seems to me that when the reasoning of the learned county court judge is appreciated and the facts of the case are looked into, the matter is simple. I can quite understand that if the learned county court judge had come to the conclusion that the injury was due to the first accident, and had given judgment against the employers, there might then be very difficult questions to consider. I am by no means certain, myself, that if such a finding had resulted, it would have stood the test of an appeal in this Court. But it seems to me quite unnecessary to consider those questions, because we are faced with a comparatively simple case in which the learned county court judge has come to the conclusion that the injury was caused by the second accident, and, that being so, he has obviously come to the conclusion to which the ordinary individual would have come—the ordinary conclusion which is not always logically correct, but which is founded on the principle of post hoc, propter hoc. You have the second accident, and then you find an injury, and the natural conclusion is that the injury is due to that which had immediately preceded the injury. I do not think that that is the inevitable result, but it seems to me to be a result which can hardly be set aside in this Court, when it is arrived at by a judge who is a judge of fact and who has before him the sort of evidence which we have in this case. Here there can be no doubt that the immediate proximate cause of the injury was the slipping of the collier in his own yard; and that but for that slip, there would without any question have been no injury to the leg at all. It is equally true that if the leg had not been weakened by the previous accident some nine months before, no injury at all might have occurred, but in the interval between the two accidents, as the learned judge has found, and there was ample evidence to support his finding, the

man had recovered completely from the first accident, subject only to this, that he had a certain weakness left, which rendered it more probable that a second accident might occur to him than to the ordinary individual. In that state of things the learned county court judge has said: "In my judgment that which caused the injury was the second accident and not the first." It appears to me that there was ample evidence on which he could come to that conclusion, and indeed I think that *Roberts* v. *Broughton, &c., Colliery Co.* (1), which was last referred to in argument, is a case which is roughly on all fours with the present, and practically indistinguishable from it. There the first accident had left a permanent weakness, which did not prevent the man doing his work, but which rendered him more liable than an ordinary individual to the second accident which occurred. There, as here, the learned county court judge came to the conclusion that it was the second accident that caused the injury. The Court of Appeal held that he had material on which he could come to that conclusion, and therefore supported his view. Here I entirely reserve my opinion as to what might be the case in law had the learned county court judge come to the opposite conclusion and had said that the injury was caused by the first accident.

Appeal dismissed.

Solicitors for appellant: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

Solicitors for respondents: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes & Co, Rotherham.*

(1) 14 B. W. C. C. 186.

W. I. C.

Applied. KESTELL *v.* LANGMAID. [1949] 2 All E.R. 749.

Applied. KESTELL *v.* LANGMAID [1950] 1 K. B. 233

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[IN THE COURT OF APPEAL.]

WESTLAKE *v.* PAGE (LANDLORD).

Landlord and Tenant—Agricultural Holding—Disturbance by Notice to Quit—Compensation — Tenant occupying two or more Holdings — Reduction of Compensation—Agricultural Holdings Act, 1923 (13 & 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-ss.* 1, 6, 8.

By s. 12, sub-s. 1, of the Agricultural Holdings Act, 1923: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the tenant—(*e*) has . . . . refused, or within a reasonable time failed, to agree to a demand made to him in writing by the landlord for arbitration as to the rent to be paid for the holding . . . . compensation for the disturbance shall be payable by the landlord to the tenant."

A landlord of a holding gave the tenant notice to quit, and in the same document stated that he had no desire to terminate the tenancy if the tenant would agree to his demand that the rent should be fixed by arbitration. The tenant did not agree to arbitration:—

Held, that the tenant did not thereby disentitle himself to compensation, for the refusal or failure to agree to arbitration dealt with by para. (*e*) is a refusal or failure which has taken place before the date of the notice.

By sub-s. 6: "The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal" of his household goods, farm stock, etc., "but for the avoidance of disputes such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed an amount equal to one year's rent of the holding, in which case the sum recoverable shall be such as represents the whole loss and expenses so incurred up to a maximum amount equal to two years' rent of the holding."

By sub-s. 8: "In any case where a tenant holds two or more holdings, whether from the same landlord or different landlords, and receives notice to quit one or more but not all of the holdings, the compensation for disturbance in respect of the holding or holdings shall be reduced by such amount as is shown to the satisfaction of the arbitrator to represent the reduction (if any) of the loss attributable to the notice to quit by reason of the continuance in possession by the tenant of the other holding or holdings":—

Held, that it could not be laid down as a matter of law, that in no case could the minimum compensation of one year's rent provided by sub-s. 6 be reduced under the provisions of sub-s. 8 if the tenant, having held two or more holdings as tenant, remained in possession

of one of them. But the provisions of sub-s. 8 have no application to a case in which the tenant remained in possession of the other holding or holdings, not as tenant, but as owner.

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APPEAL from the judgment of the county court judge of Towcester on a special case stated by an arbitrator under the Agricultural Holdings Act, 1923.

SPECIAL CASE.

1. For some time before October 17, 1923, Frederick Westlake was tenant and James Page was landlord of a farm situate at Preston Deanery in the county of Northampton, known as the Rookery Farm, on a yearly Lady Day tenancy.

2. On October 22, 1923, the landlord's solicitors sent to the tenant by post a notice to quit in the following form: "I, James Page, ... do hereby demand and give you notice to quit and deliver up the possession of the farmhouse buildings and lands . . . . which you now hold of me situate at Preston Deanery on March 25, 1925, or at the expiration of the year of your tenancy which shall expire next after the end of one year from the service of this notice, but I declare that I have no desire to terminate the tenancy if you will agree to my demand that your annual rent of 270*l.* per annum . . . . shall be raised to 365*l.* per annum to commence from the said March 25, or that the annual rent to commence from that date shall be fixed by arbitration in accordance with the provisions of the said Acts. Dated this 17th of October, 1923. (Signed) James Page." The notice was enclosed in a covering letter from the landlord's solicitors, wherein they said: "As now instructed by Mr. Page we herewith enclose notice to quit, unless you are prepared to continue the tenancy on the terms suggested in the notice."

3. On or about March 25, 1924, the tenant informed the landlord that he would not keep the farm on at the rent asked.

4. On February 19, 1925, the tenant sent the landlord a notice of his intention to claim compensation for disturbance.

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And on the same day the tenant's solicitors wrote to the landlord's solicitors that the tenant was willing to allow the landlord to withdraw the notice to quit provided the question of rent was immediately submitted to arbitration. The landlord's solicitors replied that their client had made all preparations to take over the land and had purchased his implements, etc., and therefore could not withdraw the notice.

5. On or about March 25, 1925, the tenant gave up possession of the holding.

6. At all material dates the tenant was and still is the tenant of another holding, and the absolute owner of a farm, both of which adjoin the holding called Rookery Farm.

7. It was contended by the tenant :—

(*a*) That, although he might have failed to agree to a demand made to him in writing by the landlord for arbitration under the Act as to the rent to be paid for the holding, he was nevertheless entitled to compensation for disturbance, for the notice to quit did not state that it was given for that reason or for any other of the reasons mentioned in s. 12, sub-s. 1, of the Act.

(*b*) That as he claimed only the minimum compensation under the Act—namely, an amount equal to one year's rent of the holding, the arbitrator was not entitled to reduce the compensation by reason of the tenant holding two or more holdings, and that s. 12, sub-s. 8, of the Act did not apply.

(*c*) That in any case the arbitrator was not entitled to reduce the compensation by reason of the tenant being the absolute owner, as distinguished from tenant, of another farm.

The questions of law for the opinion of the Court were as follows :—

1. Whether in the circumstances above set forth the tenant is or is not entitled to compensation for disturbance.

2. Whether, if the tenant is entitled to compensation, s. 12, sub-s. 8, is to be interpreted to mean that the minimum of one year's rent is reducible in the case of a tenant holding

two or more holdings, or whether it only applies if the tenant proves that his loss or expense under s. 12, sub-s. 6, exceeds one year's rent of the holding.

3. If the minimum compensation is reducible, whether the arbitrator is entitled to take into consideration a farm of which the tenant is the absolute owner as distinguished from one of which he is a tenant.

The county court judge was of opinion that the notice to quit sufficiently stated that it was given for the reason specified in sub-s. 1 (*e*)—namely, that the tenant had failed to agree to a demand for arbitration, and that the tenant was consequently not entitled to any compensation. Under these circumstances the points submitted by the arbitrator in questions 2 and 3 did not arise.

The tenant appealed.

Singleton K.C. and *W. Allen* for the appellant. The tenant is entitled to compensation, for he did not come within any of the exceptions in s. 12, sub-s. 1. (1) He did not fail to

(1) By s. 12, sub-s. 1, of the Agricultural Holdings Act, 1923: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the tenant—

(*a*) was not at the date of the notice" cultivating properly;

(*b*) "had, at the date of the notice, failed to comply" with a notice requiring him to remedy breaches;

(*c*) "had, at the date of the notice," prejudiced the landlord's interests;

(*d*) "was at the date of the notice" a bankrupt;

(*e*) "has, on or after the first day of January, 1921, refused, or within a reasonable time failed to agree to a demand made to him in writing by the landlord for arbitration under this Act as to the rent to be paid for the holding as from the next ensuing date at which the tenancy could have been terminated by notice to quit given by the landlord at the date of the said demand; or

(*f*) had, at the date of the notice" failed to comply with a demand to execute a tenancy agreement;

"And unless the notice to quit states that it is given for one or more of the reasons aforesaid,

compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section:

"Provided that—

(i.) Compensation shall not be payable under this section in any case where the landlord has made to the tenant an offer in writing to withdraw the notice to quit and the tenant has unreasonably refused or failed to accept the offer."

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agree to the landlord's demand for arbitration within para. (*e*), for the failure there referred to is a failure that has preceded the notice to quit in time. It is not enough to exclude the tenant's right to compensation that the landlord should give a notice to quit in anticipation of a failure to agree, for the sub-section says that the compensation shall be payable "unless the notice to quit states that it is given for one or more of the reasons aforesaid," and it cannot state that it is given for that reason if the failure to agree has not yet taken place. Then, if he is entitled to compensation at all he is entitled to the whole amount that he claims. For sub-s. 8 does not apply to a case in which the tenant claims no more than a year's rent. In such a case there can be no deduction in respect of the continuance in possession by the tenant of another holding, for a year's rent is the minimum, and there can be no deduction from a minimum. This is so even where the other holding is held under a tenancy. But still less does sub-s. 8 apply where the other holding is held by the tenant as owner, for the sub-section speaks of the tenant holding two or more holdings from a "landlord" or "landlords," that is to say under a contract of tenancy.

Rowlands for the respondent. The tenant is not entitled to any compensation under s. 12, for that section only applies where the tenancy is terminated by a notice to quit, and here the tenancy was not so terminated, for what purported to be a notice to quit was not an absolute notice but conditional; it only called upon the tenant to give up possession in the event of his not agreeing to the rent being raised or being fixed by arbitration. The notice was therefore bad in law, and ineffectual to put an end to the tenancy.

But even if the notice to quit did terminate the tenancy, still the compensation is not payable, for two reasons: (1.) There was in the notice itself an offer by the landlord to withdraw it, within the meaning of the proviso (i.) to s. 12, sub-s. 1. The words "I declare that I have no desire to terminate the tenancy if you will agree to my demand, etc.," amount to an offer to withdraw the notice in the events

specified. And that offer the tenant unreasonably failed to accept. (2.) The notice to quit contained a demand that the tenant should agree to refer the question of the rent to arbitration, and it correctly stated that the failure so to agree was the reason for giving the notice. The demand for arbitration was made on the date of the notice, October 23, 1923, but the notice to quit, being a twelve months' notice to quit at Lady Day, 1925, only commenced to operate on Lady Day, 1924, that is to say, five months after the demand for agreement to arbitration. It was only in the event of the tenant having failed in the interval to agree that it was to operate at all, and when it did so it spoke, not as of the date of the document, but as of the date when the notice to quit commenced to operate, and, so speaking, must be read as referring to the failure to agree as the reason for terminating the tenancy.

If, however, that contention is wrong, and the tenant is entitled to compensation, the arbitrator's second question must be answered in the affirmative, for otherwise no meaning can be given to sub-s. 8. That sub-section cannot apply to a case where the tenant claims more than a year's rent, for in that case he has to prove his actual loss, and, in arriving at that loss, the arbitrator would have to allow for the saving of expense in removing the stock and furniture, etc., to an adjacent holding, even if sub-s. 8 had never been enacted—as applied to such a case the sub-section would be entirely superfluous. Therefore sub-s. 8 must apply where the tenant claims no more than a year's rent. That amount is not an irreducible minimum. To entitle the tenant to a year's rent he must prove some loss, *Minister of Agriculture* v. *Dean*(1), and, that being so, it must be open to the landlord to show that by reason of the tenant removing his goods, etc., to an adjoining holding, he was saved from incurring any loss at all. With respect to the arbitrator's last question, it is not now contended that it should be answered in the landlord's favour.

Allen was heard in reply.

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BANKES L.J. In this case a tenant claims compensation from his landlord under the Agricultural Holdings Act, 1923, for disturbance by reason of the termination of his tenancy by notice to quit. The landlord contends that under the circumstances of the case the tenant is not entitled to any compensation at all, but that if he is the arbitrator in assessing the compensation is bound to take into consideration the fact that he occupies two other holdings, one as tenant, and the other as owner.

The question whether the tenant is entitled to any compensation at all depends upon the terms of the notice to quit which the landlord gave him. The section upon which the claim for compensation is based, s. 12, provides that "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding," then unless certain things have happened and the notice to quit had been given in a certain form "compensation for the disturbance shall be payable by the landlord to the tenant." The first point taken by the landlord in this case is a technical one, that the notice to quit given was in law a bad notice, because it was conditional, and that under those circumstances the case does not come within the section at all, for that section when speaking of a holding being terminated by a notice to quit must presumably refer to a termination by a valid notice. I cannot accept that contention. It seems to me that if a notice to quit is given, whether it be a good or a bad one, and it is accepted as a good notice by the tenant, who quits the holding in consequence of it, the case comes within the language of the section. That technical point therefore fails. Then it is said that even if the notice to quit was good still the tenant is not entitled to compensation because he did not satisfy condition (*e*) of s. 12, having "failed to agree to a demand made to him in writing by the landlord for arbitration as to the rent to be paid." That is one of a group of six conditions all of which have reference to matters already past at the time of the notice given. They all of them, with the exception of (*e*), expressly refer to some omission or act done "at the date of

the notice," and though those words do not occur in (*e*) the limitation of its application is the same, for the section goes on to add a further condition, "unless the notice to quit states that it is given for one or more of the reasons aforesaid," and it seems impossible to say that a notice which is given in anticipation of something being done in the future—here the failure to agree to arbitration—is a notice "given for one of the reasons aforesaid." Here the landlord endeavoured to arrive at his object by a short cut, by giving a notice which should only operate in the event of the tenant failing to comply with the condition which was specified in it, and a notice which at the same time included the proviso at the end of the section: "Provided that compensation shall not be payable under this section in any case where the landlord has made to the tenant an offer in writing to withdraw the notice to quit and the tenant has unreasonably refused or failed to accept the offer." The notice began in the usual form, requiring the tenant "to quit and deliver up possession . . . . on the 25th day of March, 1925, or at the expiration of the year of your tenancy which shall expire next after the end of one year from the service of this notice." Standing by itself that is a perfectly good notice. But then the landlord sought to incorporate the proviso, and the notice went on "But I declare that I have no desire to terminate the tenancy if you will agree to my demand that your annual rent of 270*l.* per annum . . . . shall be raised to 365*l.* per annum to commence from the said 25th day of March, 1925, or that the annual rent to commence from that date shall be fixed by arbitration in accordance with the provisions of the said Acts." The tenant acknowledged receipt of that notice but did nothing, and therefore, if it were not for the requirement of s. 12, sub-s. 1, that the notice must state that it is given for one of the reasons previously mentioned in the sub-section, I think the landlord would have been entitled to say that the tenant had failed to agree to his demand in writing for arbitration. But it is not enough to deprive the tenant of his right to compensation that he failed to agree with that demand, unless the notice stated that it was given in

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consequence of that failure, that being the only condition in the sub-section on the breach of which the landlord in the present case relies. And the notice does not state that it was given for that reason. At the time when the notice was given the tenant had not had any opportunity of complying with the demand, for no such demand was made on him until he got the notice to quit. In those circumstances it is impossible to say that the notice complies with the provisions of the statute. It is plain that the section assumes that the notice, if it is to be one which will disentitle the tenant to compensation, must be given after the breach of one or more of the six conditions specified in the section has happened. The landlord's proper course is to give the tenant two notices, first a preliminary notice requiring him to pay an increased rent or agree to arbitration within a specified reasonable time, taking care that that reasonable time shall expire before the commencement of the twelve months, which under s. 25, sub-s. 1, is the necessary period of a valid notice to quit; and then if that preliminary notice is not complied with he can follow it up with a notice to quit the holding. Unfortunately for the landlord that course was not adopted in the present case, with the result that the first question asked in the special case must be answered in favour of the tenant.

The next question—namely, whether the provisions of s. 12, sub-s. 8, have any application to a case where under sub-s. 6 the tenant only claims the conventional amount of compensation of one year's rent—raises a point on which I desire to say as little as possible. We are only asked to say whether as a matter of law they apply. Now I must admit that I have the greatest difficulty in giving any intelligible meaning at all to sub-s. 8, that is to say I cannot at present see any state of facts to which it could possibly apply. It says that where a tenant holds two or more holdings and receives notice to quit one of them, the compensation for disturbance shall be reduced by the amount by which the loss attributable to the notice to quit is reduced by reason of the continuance in possession by the tenant of the other holding or holdings.

That refers to sub-s. 6, by which the compensation payable is to be a sum "representing such loss . . . . as the tenant may unavoidably incur" in connection with the sale or removal of his goods or stock, and that sub-section deals with two classes of cases, one in which the tenant claims for a loss exceeding a year's rent, and the other in which the loss claimed does not exceed that figure. Where the loss claimed exceeds a year's rent "the sum recoverable shall be such as represents the whole loss." Therefore if the loss might have been diminished by the tenant removing his goods or stock to another holding in his occupation it must be assumed that the arbitrator has already taken that fact into consideration in arriving at the "whole loss," for otherwise the loss would to that extent have not been "unavoidably incurred." But if that is so there is no room for any further reduction of the kind indicated by sub-s. 8. And it is equally difficult to see how sub-s. 8 can apply where the tenant claims no more than a year's rent, for that is the conventional sum to which he is in any event to be entitled. But on the other hand I have a difficulty in saying, in reference to any provision of an Act of Parliament, that it can have no meaning at all. What appears to have been in the mind of the Legislature was that there might be circumstances in which a reduction ought to be made, even though the effect would be to reduce the compensation payable to a sum which was less than the amount of the actual loss, and although I can not at present see what those circumstances may be I must assume that there may be such. Whether any such circumstances exist in the present case it is impossible to say until the necessary facts have been found by the arbitrator. In the meantime we must answer the question in favour of the landlord, and say that as a matter of law the minimum of one year's rent for compensation is reducible in the case of a tenant holding two or more holdings as tenant, leaving it to the arbitrator to say what, if any, is the reduction to be allowed, and laying great emphasis upon the words "if any."

The answer to the remaining question, whether such

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minimum compensation is reducible in a case in which the tenant holds another holding as owner, is I think quite plain. Sub-s. 8 only applies "where a tenant holds two or more holdings, whether from the same landlord or different landlords," that is to say, where the tenant of the holding in respect of which compensation is sought holds one or more other holdings under a contract or contracts of tenancy, which excludes the applicability of the sub-section to a case where he holds the other holdings as owner.

WARRINGTON L.J. I am of the same opinion. The answer to the first question, that is to say, whether the notice to quit is in such a form as to deprive the tenant of any right to compensation, depends upon, first, the construction of s. 12, sub-s. 1, and, secondly, upon the construction and effect of the notice itself. Sect. 12, sub-s. 1, contains an enumeration of six different things by reason of the existence of which the tenant may be deprived of what prima facie would be his right to compensation for disturbance, subject to the further provision that the notice to quit must state that it is "given for one or more of the reasons aforesaid." Those reasons are contained in six paragraphs headed (*a*) to (*f*), and in each of them, with the exception of (*e*), it is expressly provided that the reason must exist "at the date of the notice." Those words do not indeed occur in para. (*e*), the paragraph applicable to the present case, but that omission is immaterial, for the use of the past tense "has . . . . refused or within a reasonable time failed to agree" shows that it was intended that the refusal or failure should be one existing at the date of the notice to quit. And, further, I think that is made quite plain by the requirement that the notice to quit must state that it is given for one or more of the reasons aforesaid. It is impossible for a notice to state that it is given for a reason which at the time when it was given did not exist. The notice to quit in the present case did not satisfy either of the two conditions. It was not given for the reason that the tenant had refused or failed to agree to a demand for arbitration as to the rent. He had never

had an opportunity of refusal. It is obvious that all the landlord did was to give an absolute notice to quit, coupled with a statement that he did not wish to compel the tenant to leave if he would consent to pay the increased rent demanded or submit the question of the rent to arbitration. What he was contemplating was, not a refusal or failure which had already taken place at the date of the notice to quit, but one which might or might not take place in the future. And, secondly, the notice to quit did not state that it was given for one of the reasons mentioned in the section. On both grounds therefore the contention of the landlord on this point fails, and the tenant must be held not to have been deprived of his right to compensation.

The next question that we are asked is an extremely difficult one to answer. It is: Whether the provision of s. 12, sub-s. 8, is applicable to the case where the amount of loss by which the compensation is to be measured is the conventional sum provided by sub-s. 6? What sub-s. 8 provides is that where a tenant holds two or more holdings and receives notice to quit one of them, the compensation for disturbance is to be reduced by an amount representing "the reduction (if any) of the loss attributable to the notice to quit by reason of the continuance in possession by the tenant of the other holding or holdings." That language suggests that the reduction which may be made in the compensation in consequence of the tenant remaining in possession of the other holding is to be independent of the actual amount of the loss attributable to the notice to quit, and that the sum payable may be something less than the amount of the loss in fact incurred. It suggests that the arbitrator may reduce the amount of the compensation if he thinks that the tenant, instead of removing his stock to a new holding, ought to have removed it to a holding of which he continues in possession. I do not think it is possible to say as a matter of law that sub-s. 8 is not applicable to the conventional sum provided by sub-s. 6. There may possibly be circumstances under which it would be not unreasonable to apply it, though I find it difficult to imagine a case in which it would

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be applicable. We do not know the facts of the present case. Therefore all that we can say on the present occasion is that it would be going too far to lay down that there cannot be such a case.

The point raised in the third question presents no difficulty. It is quite plain that sub-s. 8 does not extend to a case where the other holding of which the tenant remains in occupation is held by him not as tenant but as owner. The sub-section in terms deals only with holdings held by "a tenant" from a landlord, "whether from the same landlord or different landlords."

SCRUTTON L.J. On the first and third points I agree with what my brothers have said, and I will only add this, that on the first point the landlord's advisers have made the mistake of trying to roll up into one notice two notices which ought necessarily to be given at different times. They have given a notice to quit which is either to operate on a future default or to be withdrawn if default is not made in the future. Such a notice seems to me to be impossible under the statute, which contemplates that the notice to quit shall be given after the default has been made by the tenant and shall specify the particular default that he has made.

The second question seems to me to be extraordinarily difficult, and for that reason I also desire to say as little as possible, though I cannot help thinking that in so doing we are treating the arbitrator rather hardly, for we are sending back the case to him with practically no guidance for the solution of the difficult problem with which he has to deal. The tenant under the Act is to have compensation for disturbance if he is turned out of his holding, unless he is turned out for certain specified defaults. How much compensation is he to have? Sub-s. 6 gives the answer: "A sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or

used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation." So far it sets out a series of detailed items, and then it goes on " but for the avoidance of disputes such sum shall, for the purposes of this Act, be computed at an amount equal to one year's rent of the holding." It was held in *Minister of Agriculture* v. *Dean* (1) that to entitle him to the year's rent the tenant must prove at least some loss, he need not quantify it, but if he proves any loss, however small, he gets a year's rent. Then the sub-section goes on to say that if he proves a loss which exceeds a year's rent the sum recoverable shall be the whole loss proved up to a maximum of two years' rent of the holding. So far there does not seem to be much difficulty. But then comes sub-s. 8, and I agree that we are bound to assume that it means something, for we can hardly suppose that Parliament while enacting the sub-section intended it to have no operation at all. Sub-s. 8 is this: " In any case where a tenant holds two or more holdings, whether from the same landlord or different landlords, and receives notice to quit one or more but not all of the holdings, the compensation for disturbance in respect of the holding or holdings shall be reduced by such amount as is shown to the satisfaction of the arbitrator to represent the reduction (if any) of the loss attributable to the notice to quit by reason of the continuance in possession by the tenant of the other holding or holdings." How are you to fit that in with sub-s. 6 ? Under that sub-section if the tenant proves any loss he gets a year's rent. What are you to do if he holds another holding ? Are you still to give him a year's rent, or are you to reduce it by something, and, if so, by what ? Under what circumstances, if any, can you apply sub-s. 8 ? It can hardly apply if the tenant proves a loss exceeding a year's rent, for in that case he is to recover the actual loss, " the whole loss and expenses so incurred." It looks therefore as if there must be some cases to which sub-s. 8 applies where the tenant is only claiming a year's rent. If there are no such cases it is difficult to see

(1) [1924] 1 K. B. 851.

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any cases to which the sub-section can apply. I do not profess to be able to foresee all the possible circumstances that may arise where a tenant who is turned out of one holding continues to hold another one adjoining, and I do not think it is possible for the Court to lay down any general rule dealing with such cases if there are any. In the present case we know nothing about the facts, for they have not yet been found, and all that I feel inclined to say at present is that we cannot say as a matter of law that under no circumstances can the conventional loss of one year's rent be reduced by a deduction under sub-s. 8. There may possibly be circumstances in which the reduction would be justifiable; and when the facts are found we shall be prepared to say whether it is justifiable in the particular case or not. I should like to add two things, first, that the landlord has to prove the reduction (if any) of the loss attributable to the notice, and secondly, although I am not sufficiently clear upon the point to justify me in answering the arbitrator's second question in the negative, I rather incline to the view that "the loss attributable to the notice to quit" means the actual loss and not the conventional loss of one year's rent.

Appeal allowed.

Solicitors for the appellant: *Ellis & Fairbairn.*

Solicitors for the respondent: *Routh, Stacey & Castle, for H. Thompson & Sons, Grantham.*

J. F. C.

ATKINSON *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

1925
Nov. 13.

Factory—Fencing of Machinery—Mill Gearing—Shaft with Pulley—Height above Ground—Necessity for Fencing—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10, *sub-s.* 1 (*c*).

The respondents were the occupiers of a factory, in which there was a tube-cutting machine driven by a pulley fixed on a horizontal shaft about 13 feet above the floor. The shaft and pulley were part of the mill gearing and they were not in any way fenced or guarded. The belt for driving the machine being off the pulley, an employee of the respondents was requested by another person in their service to move the belt from the shaft to the pulley while the shaft was running. He accordingly went up a ladder, stood on a beam about 7 feet from the floor, and attempted to move the belt, when in so doing he was injured. An information against the respondents charged that, contrary to the Factory and Workshop Act, 1901, s. 10, sub-s. 1 (*c*), a part of the mill gearing, namely the said shaft with the pulley on it, was not securely fenced nor in such position or of such construction as to be equally safe to every person employed or working in the factory as if it had been securely fenced. On appeal from the decision of the justices dismissing the information :—

Held, that the fact that the shaft was 13 feet above the ground did not render a fence unnecessary ; that it could not be assumed as fact that the shaft and pulley would never be approached by any person employed or working in the factory except for some such occasional purpose as that of moving the belt, or that no fence could have been provided which would not have to be removed in order to carry out any such purpose ; that in the circumstances the shaft and pulley were not in such position or of such construction as to be equally safe as if they were securely fenced ; and that, therefore, the respondents in failing to fence the shaft and pulley had contravened the above-mentioned provision and should be convicted.

Scott v. *Brookfield Linen Co.* [1910] 2 I. R. 509 distinguished, but observations approved.

Case stated by justices for the Isle of Ely.

On June 3, 1925, an information was preferred before the justices by the appellant, an inspector of factories at Cambridge, against the respondents, the London and North Eastern Railway Company, charging that on April 23, 1925, they were the occupiers of a certain factory within the meaning of the Factory and Workshop Acts, 1901 to 1911, at Whitemoor Sidings, in the parish of March, in the county of Cambridge, and that on that date the factory was not kept in conformity

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with these Acts in that a part of the mill gearing, to wit, a part of the main shafting with the pulley on it, used for driving a tube-cutting machine in the engineer's shop, was not securely fenced nor in such a position nor of such construction as to be equally safe to every person employed or working in the factory as it would have been if it had been securely fenced, contrary to s. 10, sub-s. 1 (*c*), of the Act of 1901, and that in consequence of that neglect one Frederick G. S. Cresswell suffered bodily injury.

At the hearing of the information the following facts were proved or admitted: On April 23, 1925, the respondents were the occupiers of a factory situate as above mentioned, and in that part of the factory described as the engineer's shop there was a tube-cutting machine driven by a pulley fixed on a horizontal shaft. On that date, at about 7.30 A.M., the belt used for driving the said machine was off the pulley, and the said Cresswell, a person employed by the respondents, was requested by Edward Smith, another of their employees, to move the belt from the shaft to the pulley while the shaft was running, and in attempting to do this Cresswell was injured. The shaft and pulley were elevated about 13 feet from the floor of the shop, and when attempting to put on the belt Cresswell went up a ladder and stood on a beam about 7 feet from the floor. The shaft and pulley were not in any way fenced or guarded.

For the appellant it was contended that the shaft should have been fenced, as it was not in such a position as to be equally safe to every person employed or working in the shop as it would have been if it had been securely fenced.

For the respondents it was contended that the shafting was safe by reason of its position, that Cresswell was acting contrary to regulations in attempting to move the belt from the shaft to the pulley while the engine was running, and that any guard which could have been used for fencing the shaft and pulley must have been removed before the belt could have been put on the pulley.

The justices, having considered the above facts, came to a decision which they expressed as follows: "We being of

opinion that any fence would have been useless owing to the shaft being 13 feet from the ground decided to dismiss the case."

H. M. Giveen for the appellant.

W. E. Bousfield for the respondents.

LORD HEWART C.J. This is a case stated by justices, and the question which is involved arises upon an information preferred by the appellant against the respondents under the Factory and Workshops Acts, 1901 to 1911, for not keeping their factory in conformity with those Acts in the sense that part of the mill gearing—namely, a part of the main shaft with the pulley on it used for driving a tube-cutting machine in the engineer's shop—did not conform to the requirements of the Act of 1901, s. 10, sub-s. 1 (*c*). The material facts stated in the case to have been proved or admitted before the justices are, that on the material date there was in the engineer's shop a tube-cutting machine driven by a pulley fixed upon a horizontal shaft; that about half-past seven in the morning the belt that was used for driving that machine was off the pulley; that thereupon a person employed by the respondents was requested by another employee of the respondents to move the belt from the shaft to the pulley; that that request was made and was obeyed when the shaft was running; that in making the attempt to remove the belt from the shaft to the pulley Cresswell was injured; that the shaft and pulley were elevated about 13 feet from the floor of the shop; that when attempting to put on the belt, Cresswell went up a ladder and stood on the beam about 7 feet from the floor; and that the shaft and pulley were not in any way fenced or guarded. Those are all the material facts found in this case. Upon those facts the justices "being of opinion that any fence would have been useless owing to the shaft being 13 feet from the ground decided to dismiss the case." The important statutory provision for the purposes of this case is s. 10, sub-s. 1 (*c*), of the Act of 1901, which provides that "All dangerous parts of the machinery and every part of the mill gearing must either be

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securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it was securely fenced." It is common ground that the shaft and pulley which are referred to here were part of the mill gearing, and that they were not in any way fenced or guarded. An offence was therefore committed under the clause mentioned, unless the shaft and pulley were in such position or of such construction as to be equally safe to every person employed or working in the factory as they would have been if they were securely fenced. To express it shortly in the paraphrase which one finds in the text-book, cl. (*c*) means that the machinery there described need not be fenced, if by reason of its position, or construction, it is as safe as it would be if fenced. Now the justices have not found in the terms of that section, although invited to do so, that this part of the mill gearing was, by reason of its position or construction, equally safe to every person employed or working in the factory, as it would have been if it had been securely fenced. What they mean by their decision is a question no doubt of some difficulty and admits of some conjecture. It is to be observed that one of the contentions before them on behalf of the respondents was that the unfortunate man who was hurt was acting contrary to regulations in attempting to remove the belt from the shaft to the pulley while the engine was running, and it may well be that what the justices had in mind was that to the bulk of the persons employed in the factory, if they observed the regulations, this shaft and pulley were just as safe unfenced as they would have been if fenced. That, however, is not what the section contemplates. The test is much more rigorous. The justices, before they can dismiss the information in such a case as this, have to find that the gearing complained of is equally safe to every person employed, or working in the factory, as it would be if it were securely fenced. The law relating to this part of the Act is set forth in three cases, which, to take them in chronological order, are: *Hindle* v. *Birtwistl* (1); *Blenkinsop* v. *Ogden* (2); *Davies* v.

(1) [1897] 1 Q. B. 192. (2) [1898] 1 Q. B. 783.

Thomas Owen & Co., Ld. (1) In the recent case of *Butler* v. *Glacier Metal Co.* (2), the facts were in some respects curiously similar to the facts in this case. The unfortunate man who suffered injury on the occasion there referred to was not a person employed in the factory. He was a person employed by an electric supply company who, at that time, were renewing the whole of the electric lighting installation in the factory. On November 14, 1923, two persons employed by that company were engaged on certain work in connection with the renewal of the electric light wiring on the inside of the roof of a bay at the end of the machine shop of the factory. The main driving shaft which was part of the mill gearing extended from the machine shop into the bay at a height of 10 feet above the floor level. On the occasion in question this shaft was revolving at a speed of about 180 revolutions per minute. Part of the wiring which was being renewed was attached to the inside of the ridge of the roof almost directly above the shaft, but about 9 feet from it. For the purpose of gaining access to a point in the roof of the bay above and to one side of the driving shaft the two said persons placed a pair of steps underneath the shaft, and erected a ladder on its third tread, the top of the ladder resting against the roof, and one of the persons ascended the ladder in connection with his work. In descending he stepped from the ladder on to the steps, and the result was that his coat was caught by the revolving shaft, and he sustained serious injuries. A passage from the judgment in that case, if I may read it, was as follows: "Now the question which these justices had to determine was whether it was proved that, in fact, this part of the mill gearing was in such position, or of such construction, as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced, but it does not appear from the case that the justices really directed their minds to that question. On the contrary, it does appear from the case that, no matter what warnings may have been addressed to them by the learned counsel, they directed

(1) [1919] 2 K. B. 39. (2) 1924, Oct. 23. Div. Court. Unreported.

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their minds to other questions, in a way which was erroneous." I need not pursue the judgment further. In the present case Mr. Bousfield invites the Court upon no material to assume two findings of fact which do not appear in the case—namely, first, a finding of fact that this part of the mill gearing is never approached by any person employed by the respondents except for such an occasional and temporary purpose as this, of moving the belt from the shaft to the pulley, and, secondly, a finding of fact that, if fencing there had been, no ingenuity could have devised a type of fence which on the occasion of such an emergency as arose in this case would not have had to be removed. His argument is that those two propositions put together show that no fencing would have been of any avail, because it would have had to be removed on every occasion on which anybody went near this shaft and pulley. One can only say that there are in this case no such findings of fact, and nothing approaching to them. The justices have stated their conclusion in simple and intelligible terms. They were of opinion that any fence would have been useless because the shafting was 13 feet above the ground. There is nothing in the section referred to or elsewhere in the Acts which grants a dispensation from the obligation to fence because the mill gearing is 13 feet above the ground. In those circumstances it seems clear that the justices have come to an erroneous decision in point of law. I therefore think that this appeal ought to be allowed, and that the case ought to go back to the justices with a direction to convict.

AVORY J. I entirely agree. I only desire to add that the finding by the justices that this shaft was 13 feet above the ground is not, in my opinion, sufficient to bring it within s. 10, sub-s. 1 (*c*), of the Act of 1901. In other words the mere fact that an unfenced shaft is 13 feet above the ground is not sufficient to show that it is in such a position as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. In this case there is no evidence before us that

this shaft was in such a position as to comply with that portion of the section. I agree therefore that the justices ought to have convicted the respondents.

SANKEY J. I agree. Sect. 10 of the Factory and Workshops Act, 1901, which has sometimes been described as the workmen s charter of safety, contemplates three sorts of machinery against which persons employed in a factory require to be protected. That section by sub-s. 1, cl. (*a*), deals with one of these classes of machinery, and with regard to that it is provided that it must be securely fenced. Clause (*b*) refers to another class of machinery, and as to that also it is provided that it must be securely fenced. Clause (*c*) relates to the third class of machinery, that is, all dangerous parts of the machinery and every part of the mill gearing, and with regard to that it is provided that it must either be securely fenced, or if it is unfenced that it be equally safe to every person employed or working in the factory as it would be if securely fenced. In my view all we have here to do is to see whether the facts bring the case within cl. (*c*). Clause (*d*), which Mr. Bousfield relied upon in aid of his contention, deals not exactly with the machinery itself but rather with the fencing of the machinery, and it provides that all the fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except under certain conditions, that is to say, when it is under repair or under examination in connection with repair, or necessarily exposed for cleaning or lubricating or altering the gearing or arrangements of the parts of the machine. In this particular case I cannot see that cl. (*d*) has anything to do with the matter under discussion. If this had been the case of a machine being fenced and the fencing being temporarily removed while the machine was under repair then no doubt cl. (*d*) would have applied, and the remarks of Palles C.B. in the case of *Scott* v. *Brookfield Linen Co.* (1) would have been extremely germane. It

(1) [1910] 2 I. R. 509, 519.

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will be observed that in that case it was found as a fact by the jury that at the time of the accident the machinery was under repair, and it was there held that, although there had been a breach of the obligation to fence, that was not the cause of the accident, inasmuch as the accident occurred while the machinery was under repair. The learned Chief Baron said: "Now, unless there be some distinction between the obligation to 'maintain securely fenced,' and to 'maintain fencing in an efficient state,' there would be a plain contradiction between clauses (*c*) and (*d*); and a construction involving contradiction ought not to be unnecessarily resorted to. We must give such a construction to both clauses as will give some effect and operation to each, to (*c*) without limit of time; to (*d*) subject to the limit that it shall not apply during the period of repair, examination, or exposure mentioned in the section. This construction is in my opinion found by giving due effect to the word 'efficient,' which seems to express the 'differentia' between the obligation as to maintenance imposed by the two clauses." In my opinion the decision in that case has no application to the facts of the case now before us. In this case we have not to consider whether the fencing should be constantly maintained. We have only to consider whether this mill gearing ought to be fenced. In my view the justices came to a wrong conclusion and the matter should be remitted to them to convict the respondents.

Appeal allowed. Case remitted.

Solicitor for appellants: *The Treasury Solicitor.*
Solicitor for respondents: *Thomas Chew.*

J. R.

RUTHERFORD, Appellant *v.* TRUST HOUSES, LIMITED, Respondents.

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Nov. 19.

Shop—Hotel—Restaurant—Waiter—Holidays—Adoption of Shops Act, 1913—*Shops Act*, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 1, 19—*Shops Act*, 1913 (2 & 3 *Geo.* 5, *c.* 24), *s.* 1, *sub-ss.* 1, 5.

Where the occupier of premises for the sale of refreshments, whether licensed for the sale of intoxicating liquor or not, elects under s. 1, sub-s. 1, of the Shops Act, 1913, that instead of the provisions of s. 1 of the Shops Act, 1912, with regard to holidays, the provisions of paras. (*a*), (*b*), (*c*) and (*d*) of s. 1, sub-s. 1, of the Shops Act, 1913, shall apply to shop assistants employed on the premises wholly or mainly in connection with the sale of intoxicating liquors or refreshments for consumption on the premises, he must be taken to elect to adopt the extended definition of shop assistant in s. 1, sub-s. 5, of the Act of 1913 (namely, that "shop assistant" includes "all persons wholly or mainly employed in any capacity at the premises in connection with the business there carried on"), and he cannot afterwards be heard to say that any person so employed is not a shop assistant.

Case stated by the Leeds stipendiary magistrate.

On May 15, 1925, an information was laid by the appellant, Albert Henry Rutherford, an inspector appointed under the Shops Acts, 1912 to 1920, against the respondents, Trust Houses, Ld., for that the respondents on April 12, 1925, in the city of Leeds, were guilty of an offence against the Shops Act, 1912, in that s. 1, sub-s. 1 (*b*) (*ii*), of the Shops Act, 1913, unlawfully was not then complied with in that no provision had been made for securing to one of the shop assistants—namely, Jack Walker, twenty-six whole holidays on Sundays in every year contrary to the form of the statute in such case made and provided. Similar informations were laid by the appellant against the respondents in respect of three other shop assistants—namely, William Fairclough, Robert Barnard, and James Wood, and further informations were laid by the appellant against the respondents alleging an infringement of the Shops Act, 1912, in that s. 1, sub-s. 1 (*b*) (*i*), of the Shops Act, 1913, was not complied with because during the year ended April 27, 1925, provision had not been made for securing in manner provided by the section to the assistants, Jack Walker and William Fairclough, thirty-two whole holidays on week-days.

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At the hearing of the informations it was proved or admitted (*a*) that the respondents were the occupiers of the Victory Hotel, situate in Briggate, in Leeds; (*b*) that the premises were licensed for the sale of intoxicating liquor; (*c*) that part of the premises—namely, the restaurant, was used for the sale of refreshments; (*d*) that the respondents had by such notice as was mentioned in s. 1, sub-s. 1, of the Shops Act, 1913, signified that instead of the provisions of s. 1 of the Shops Act, 1912, they elected that the provisions of s. 1, sub-s. 1 (*a*), (*b*), (*c*) and (*d*), of the Shops Act, 1913, should apply to the shop assistants employed in the premises; (*e*) that a notice in the prescribed form was affixed and constantly maintained in a conspicuous position in the premises referring to the provisions of s. 1 of the Shops Act, 1913, and stating the steps taken with a view to compliance therewith; (*f*) that all the alleged shop assistants were employed as waiters exclusively in the restaurant; (*g*) that no provision had been made for securing to them twenty-six whole holidays on Sundays in the year, so distributed that at least one out of every three consecutive Sundays should be a whole holiday, and, further, in respect of the waiters, Jack Walker and William Fairclough, that no provision had been made for securing to them thirty-two whole holidays on week-days; (*h*) that the restaurant in which the waiters were employed was used for the supply of meals both to residents in the hotel and to any member of the public who chose to take a meal there; (*i*) that the proportion of residents who used the restaurant for meals—namely, breakfast, luncheon, dinner, and tea, during the four months ended April 30, 1925, was 70 per cent. of the persons supplied. It was admitted that if the restaurant were a shop, and the waiters shop assistants, the offence alleged had been committed.

The magistrate was of opinion that he was bound by the decision in *Gordon Hotels, Ld.* v. *London County Council* (1) to hold that "the residential part of the hotel was not a shop within the meaning of the Shops Act, 1912." He said that he felt bound by the opinion of Ridley J. (2): "which was

(1) [1916] 2 K. B. 27. (2) [1916] 2 K. B. 33.

not dissented from by the other members of the Court, expressed quite generally and without regard to the definition of shop assistant," that " I cannot think that an hotel, the primary business of which is to provide residence for visitors, is a shop within this Act [i.e., the Shops Act, 1912]. The Legislature was dealing in the Act with retail establishments, and an hotel cannot be regarded as a retail establishment; but it had to be made clear that the Act was intended to apply to premises on which the sale of refreshments, including intoxicating liquor, was carried on, and therefore the definition of ' shop ' in s. 19 is made to include any premises where the retail trade or business of the sale of refreshments or intoxicating liquors is carried on. I do not think that an hotel in the ordinary sense of the word was intended to be covered by the definition of a shop." It had been argued that *Gordon Hotels, Ld.* v. *London County Council* (1) had been decided on the definition of " shop assistant," in s. 19, sub-s. 1, of the Shops Act, 1912, whereas that definition had been extended by s. 1, sub-s. 5, of the Shops Act, 1913, but, in his opinion, that argument, if right, would lead to the absurdity that the residential part of a hotel would, or would not, be a shop merely as the occupier of the premises had, or had not, elected that the provisions of s. 1, sub-s. 1 (*a*), (*b*), (*c*) and (*d*), of the Shops Act, 1913, should apply to shop assistants employed on the premises. He therefore dismissed the information, but stated this case for the opinion of the Court whether his decision was right.

Mortimer K.C. and *Rimmer* for the appellant. The restaurant at which the waiters in question were employed in the respondents' premises was a " shop " within the definition of the word in s. 19, sub-s. 1, of the Shops Act, 1912—namely, that the expression " shop " includes any premises where any retail trade or business (including the sale of refreshments or intoxicating liquors) is carried on. In *Savoy Hotel Co.* v. *London County Council* (2) the Savoy Hotel was held to be a " shop " within a similar definition

(1) [1916] 2 K. B. 27. (2) [1900] 1 Q. B. 665.

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in the Shop Hours Act, 1892, s. 9, which covered "retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, licensed public houses and refreshment houses of any kind," and in *Gordon Hotels, Ld.* v. *London County Council* (1) it was held that the grill room of the First Avenue Hotel, High Holborn, which was used as a restaurant both by residents and non-residents, was a shop within the Act of 1912 and that the kitchen, in which food was prepared for consumption in both the residential and non-residential parts of the hotel, formed part of the shop. Moreover, the definition of "shop assistant" in s. 19, sub-s. 1, of the Act of 1912—namely, "any person wholly or mainly employed in a shop in connexion with the serving of customers or the receipt of orders or the despatch of goods"—has now been extended by s. 1, sub-s. 5, of the Shops Act, 1913, to include "all persons wholly or mainly employed in any capacity at the premises in connexion with the business there carried on." The latter definition would clearly include waiters in a restaurant.

Oliver K.C. and *N. A. Cohen* (*W. Frampton* with them) for the respondents. The question whether or not the restaurant in the respondents' premises is a restaurant is one of fact and, so far as it has been decided by the magistrate, it has been decided in favour of the respondents. But, assuming that, for some purposes and for part of its trade, the restaurant was a "shop" within the meaning of the Act of 1912, the waiters who worked in it did not come within the definition of "shop assistant" in s. 1, sub-s. 5, of the Act of 1913, since the ordinary internal domestic work of an hotel, including service in its restaurant, is outside the scope of the Acts. The restaurant here is comparable to the dining room, as distinct from the grill room, in *Gordon Hotels, Ld.* v. *London County Council.* (1) It is true that by s. 1, sub-s. 5, of the Act of 1913 "all persons wholly or mainly employed in any capacity at the premises in connexion with the business there carried on" are included in the term "shop assistant," but the "business there carried on" must

(1) [1916] 2 K. B. 27.

mean "the retail business there carried on," since the retail trade or business conducted in premises is what gives them the character of a shop. If that were not so, any one employed by an hotel, for example, a chartered accountant, might be a shop assistant, but if that definition is adopted this case falls within the scope of the decision in *Gordon Hotels, Ld.* v. *London County Council* (1) that the waiters employed in the residential part of the hotel were not shop assistants.

LORD HEWART C.J. The respondents in this case, by giving the notice mentioned in s. 1, sub-s. 1, of the Shops Act, 1913, signified that, instead of the provisions of s. 1 of the Shops Act, 1912, they elected that the provisions of s. 1, sub-s. 1 (*a*), (*b*), (*c*) and (*d*), of the Shops Act, 1913, should apply to the shop assistants employed in their premises. When that notice had been given, it seems to me that, as the respondents had the benefit of the Act of 1913, so they must also have the burden of it. Under the Act of 1912 not only was the expression "shop" defined as including "any premises where any retail trade or business is carried on," but the expression "shop assistant" was also defined as "any person wholly or mainly employed in a shop in connection with the serving of customers or the receipt of orders or the despatch of goods." If the matter had rested there the considerations which applied in *Gordon Hotels, Ld.* v. *London County Council* (1) mutatis mutandis would doubtless have applied to the present case, but in *Gordon Hotels, Ld.* v. *London County Council* (1) no notice had been given under the Shops Act, 1913, and the matter had to be determined solely with reference to the Act of 1912.

By the Act of 1913, s. 1, sub-s. 1, however, it is provided that "The provisions of section 1 of the Shops Act, 1912, shall not apply to shop assistants employed in any premises for the sale of refreshments, whether licensed for the sale of intoxicating liquor or not, if their employment is wholly or mainly in connection with the sale of intoxicating liquors or refreshments for consumption on the premises, and if the

(1) [1916] 2 K. B. 27.

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occupier of the premises, by such a notice as is hereinafter mentioned, signifies that he elects that instead of those provisions " other provisions specified in the Act shall apply. Here that election was made, and among the results which followed was that the definition of " shop assistant " in s. 1, sub-s. 5, of the Act of 1913 became operative—namely, that " shop assistant " includes " all persons wholly or mainly employed in any capacity at the premises in connection with the business there carried on."

The effect is that if a person elects in manner provided by s. 1, sub-s. 1, of the Act of 1913 he cannot afterwards be heard to say that there are persons employed at the premises referred to in connection with the business there carried on who are not shop assistants. It appears to me, therefore, that the contention of the present appellant is right and that, for the purposes of this case, the definition of " shop assistant " in the Act of 1912 has been expressly extended by the Act of 1913 to include " all persons wholly or mainly employed in any capacity at the premises in connection with the business there carried on." The matter seems to be made even more plain when one looks at the first condition which must be fulfilled before the machinery of the Act of 1913 can be substituted for that of the Act of 1912. One is the election by the occupier of the premises, but the first condition is that the employment of the persons employed in the premises is " wholly or mainly in connection with the sale of intoxicating liquors or refreshments for consumption on the premises." For these reasons it seems to me that the respondents have put it out of their power to use the argument, undoubtedly forcible, if it had been admissible, on the true meaning of the definition in the Act of 1912. In my opinion the magistrate was wrong, and this appeal must be allowed.

AVORY J. I agree. I still feel the same difficulty that I felt in 1916 in reconciling the judgment in *Gordon Hotels, Ld.* v. *London County Council* (1) with the decision of this Court in

(1) [1916] 2 K. B. 27.

Savoy Hotel Co. v. *London County Council.* (1) It is true that the latter case was decided on a definition which expressly included licensed public houses. Channell J. in his judgment said (2): "The section (i.e., section 9 of the Shop Hours Act, 1892), in terms applies to licensed public houses of any kind, and I think that every place of business having a public house license must be held to be within the Act; there is no greater hardship in making the Act apply to employment in the grandest hotel than there is in applying it to a house of an inferior description. I think, therefore, that we are bound so to interpret the Act as to make it include the Savoy Hotel. It is true that that establishment is not an ordinary public house; but it has a public-house licence attached to it, and licensed public houses of any kind are within the operation of the Act." But when you turn to the definition of "shop" in the Act of 1912 it includes "any premises where any retail trade or business is carried on," and "retail trade or business" includes "the sale of refreshments and intoxicating liquors." By law intoxicating liquors cannot be sold without a licence, and, therefore, when you include premises where the retail business of selling intoxicating liquor is carried on you include every licensed house.

But, quite apart from the point whether the result is to make the whole of this hotel a "shop" within the meaning of the Act of 1912, I agree that the effect of the respondents' adoption of the provisions of s. 1, sub-s. 1 (*a*), (*b*), (*c*) and (*d*), of the Act of 1913 is to put it out of his power to say that the waiters who are employed exclusively in this restaurant are not persons "wholly or mainly employed in any capacity at the premises in connection with the business there carried on." Undoubtedly, part of the business carried on is the retail business of selling intoxicating liquor and refreshments. I agree that this appeal should be allowed.

SANKEY J. I agree. If an employer thinks that it would be advantageous to him to take advantage of the provisions of the Act of 1913 he must also put up with any consequent

(1) [1900] 1 Q. B. 665. (2) [1900] 1 Q. B. 669.

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disadvantages, one of which may be the enlarged ambit of the employees who come under the provisions of the Act. Having put himself under the Act of 1913 he cannot afterwards relinquish that position.

Appeal allowed.

Solicitors for appellant: *King, Wigg & Co., for T. Thornton, Town Clerk, Leeds.*

Solicitors for respondents: *Stanley Robinson & Commin.*

F. C.

C. A.

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Nov. 26, 27; *Dec.* 9.

[IN THE COURT OF APPEAL.]

BRITISH AMERICAN CONTINENTAL BANK *v.* BRITISH BANK FOR FOREIGN TRADE.

Contract—Money paid under Mistake of Fact—Recovery of—Absence of Alteration in Payee's Position.

The plaintiffs in London sold to a New York company a quantity of Belgian francs to be delivered to the defendants as the purchasers' agents in Brussels on December 31, at a price to be paid in dollars on the same day in New York, and the purchasers instructed the defendants to pay the francs when received to the C. Bank. On December 30 bankruptcy proceedings were commenced against the purchasers in New York and a receiver was appointed, and on the same day the purchasers cabled to the plaintiffs not to pay the francs to the defendants, as they, the purchasers, were unable to complete their contract. Before that cable arrived the plaintiffs had already paid the francs to the defendants, and the defendants had paid them to the C. Bank. The plaintiffs then requested the C. Bank to return them, and the C. Bank returned them to the defendants, with an explanation that they did so for the purpose of cancelling the defendants' payment to them. Under these circumstances the defendants claimed that, the money having been returned to them, they were entitled to hold it on behalf of their principals, and refused to pay it over to the plaintiffs. The plaintiffs brought their action to recover the francs as being money had and received by the defendants to their use:—

Held, 1. That, as at the time the plaintiffs paid the francs to the defendants the purchasers had already repudiated their contract, although the plaintiffs did not know that fact and consequently had not accepted the repudiation, the plaintiffs were under no legal obligation to pay, and, having paid under a mistaken belief of legal liability, they would have been entitled to recover the money back if they had

discovered their mistake before the defendants had paid it to the C. Bank; 2. That the effect of the money being returned by the C. Bank was to restore the plaintiffs to the same position as that which they occupied before the defendants paid it away, and that that position was unaffected by the fact that before redemand of the money by the plaintiffs the trustee in bankruptcy of the purchasers had directed the defendants not to part with it, and that the defendants in compliance with that direction had credited the purchasers with it in their books; 3. That consequently the defendants were bound to repay it to the plaintiffs.

Judgment of Sankey J. reversed on a question of fact.

APPEAL from Sankey J.

On December 23, 1920, the plaintiffs, a company carrying on business in London, sold to the Pacat Finance Corporation, a company in New York, 750,000 frs. to be delivered in Brussels on December 31 to the defendants as agents for the corporation, at the price of $46,481 to be paid by the corporation to the plaintiffs on the same day in New York. The plaintiffs by cable instructed their agents in Brussels, the Crédit Liègeois, to pay the 750,000 frs. to the defendants for the corporation's account. The corporation instructed the defendants to pay the francs when received to the Banque Industrielle de Chine, and as the latter bank had no representatives in Brussels the defendants arranged with them that the money should be paid to the Banque des Colonies on their behalf. On December 30 the Pacat Corporation found themselves unable to meet their liabilities, and sent a telegram to the plaintiffs telling them so and requesting them not to deliver the francs to the defendants. That telegram arrived in London at 8.16 P.M. on the 30th, but was not delivered at the plaintiffs' office till 9.30 A.M. on the 31st. The plaintiffs, on receipt of the telegram, cabled to the Crédit Liègeois in Brussels not to pay the 750,000 frs., and if already paid to ask for repayment. Before that cable reached Brussels the Crédit Liègeois had already paid the francs to the defendants, and the defendants had handed them to the Banque des Colonies to hold on account of the Banque de Chine. The Crédit Liègeois then requested the Banque des Colonies not to part with the money, but to keep it "to such end as may be right." The Banque de

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Chine, who had been informed by their New York agents of the bankruptcy of the Pacat Corporation, instructed the Banque des Colonies to pay back the 750,000 frs. to the defendants, and on January 3 they did so. On January 4 the Banque de Chine wrote to the defendants: "We beg to inform you that the payment of 750,000 frs. made to you under date 3rd January by the Banque des Colonies at Brussels was made to you for the purpose of cancelling your payment to the same amount of the 31st December last." The receiver appointed in the bankruptcy of the Pacat Corporation sent instructions to the defendants not to part with the money, and the defendants accordingly credited the Pacat Corporation with it in their books. The plaintiffs then claimed to have the money returned to them as having been paid under a mistake of fact. The defendants contended that the money was returned to them to hold for the Pacat Corporation. Sankey J. held that the money had been paid under a mistake of fact, but that as it had been paid away to the Banque des Colonies before the mistake was discovered it was too late for the plaintiffs to claim a return of the money, unless the circumstances attending its return by the Banque des Colonies to the defendants were such as to restore the parties to the position which they occupied before the defendants paid it away; and in the absence of evidence that the money was returned to the defendants for the purpose of being refunded to the plaintiffs, it must be inferred that they received it for the benefit of their principals; he treated the payment to the defendants by the plaintiffs and the repayment by the Banque des Colonies to the defendants as wholly independent transactions. He said: "I am not at all saying what might have happened if the plaintiffs had been able to implement their evidence, but in the state of the evidence I think the fallacy is in not regarding these two transactions as separate transactions." He accordingly gave judgment for the defendants.

The plaintiffs appealed.

A. T. Miller K.C. and *Hilbery* for the appellants. The money was paid to the defendants on December 31 under a

mistake of fact, that is to say under a belief that the Pacat Corporation was solvent and capable of completing its contract by paying the price of the francs simultaneously with their delivery to the defendants and that consequently the plaintiffs were under a legal obligation to pay the francs at the time at which they did so. The facts are very similar to those of *Kerrison* v. *Glyn, Mills, Currie & Co.* (1) There the plaintiff in England contracted with Kessler & Co., bankers in New York, that in consideration of the latter honouring drafts of a Mexican company up to 500*l.* he would keep that company's account in credit by paying 500*l.* from time to time to Kessler's account with the defendants, on being advised that the credit was nearly exhausted. On October 21, 1907, Kessler advised the plaintiff that they had credited the Mexican company in their books with 500*l.* and requested him to pay that amount to their account with the defendants. On October 31 the plaintiff placed the money to Kessler's credit with the defendants. In the meantime Kessler had stopped payment, but no cheques had been presented to them by the Mexican company for payment since the last entry of credit in Kessler's books. The plaintiff applied to the defendants for repayment, but the defendants, to whom Kessler & Co. were largely indebted, refused. The House of Lords held that he was entitled to recover the money as having been paid under a mistake of fact. As Lord Atkinson said: "He lodged the money in the belief that Kessler & Co. were a living commercial entity able to carry on their business as theretofore, and that they were in a position to honour and would honour the drafts of the (Mexican) company up to the sum which he, in anticipation, sent to recoup them for their repeated advances. Kessler & Co. had in fact ceased to be in that position."

Then if the payment was made under a mistake of fact the money could have been recovered back from the defendants so long as it remained in their hands, that is to say in the interval between their receipt of it from the Crédit Liègeois and the payment to the Banque des Colonies: *Buller* v.

(1) (1911) 17 Com. Cas. 41, 50.

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Harrison. (1) And it could have been so recovered in whatever character the defendants received it, that is to say whether they received it as principals or agents; for, as Lord Loreburn said in *Kleinwort* v. *Dunlop Rubber Co.* (2): "It is indisputable that if money paid under a mistake of fact and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received." And the same principle must apply even where the position of the person receiving the money has been temporarily altered by his paying it away, if before the redemand the status quo ante has been restored by reason of the money being returned. So far Sankey J. agreed with the contention of the plaintiffs.

But the learned judge was wrong in taking the view that the return of the money to the defendants did not restore the parties to their former position. He thought that the payment to the Banque des Colonies and the repayment by them to the defendants were independent transactions, as no doubt they would be if the francs after payment to the Banque des Colonies had found their way into the hands of strangers and been redeposited by them with the defendants. The letter of the Banque de Chine to the defendants of January 4 expressly says that the repayment to them on January 3 was for the purpose of cancelling the payment by them on December 31. And as the Banque de Chine at that time knew of the bankruptcy of the Pacat Corporation, and assumed that the original payment had been by mistake, they must have intended by the words "cancelling your payment" that the return of the money was by way of correction of the mistake. But a mistake and its correction can hardly be regarded as independent and unconnected facts. That the defendants were the agents of the Pacat Corporation cannot affect the question what they ought to do with the money when returned to them. Nor was it material that the receiver appointed in the bankruptcy of the corporation directed the defendants not to part with the

(1) (1777) 2 Cowp. 565. (2) (1907) 23 Times L. R. 696, 697.

money, and that the defendants in obedience thereto credited the corporation with it in their books before it was redemanded by the plaintiffs: *Buller* v. *Harrison*. (1)

Jowitt K.C. and *Sir Cassie Holden* for the respondents. The judge below was wrong in finding that the money was paid under a mistake of fact. It was paid under the obligation created by the contract of sale, which obligation remained binding until the contract was rescinded by acceptance of the Pacat Corporation's repudiation. Although that repudiation was before payment, as it was not accepted till after payment it can have had no effect upon the obligatory character of the payment itself. But, assuming that the money was paid to the defendants on December 31 under a mistake of fact, it is conceded by the plaintiffs that, inasmuch as before notice of the mistake the defendants had paid it away, the plaintiffs could not recover it back unless the return of it to the defendants on January 3 had the effect of restoring them to the same position as that which they were in before they paid it away. But it had not that effect. For the defendants, when so paying it away, paid it to the Banque des Colonies as the representatives of the Pacat Corporation, and the Banque des Colonies when repaying it did so "for the purpose of cancelling your payment to the same amount of the 31st of December last," a statement which was tantamount to a direction that the defendants were to hold the money on behalf of the Pacat Corporation, and that was a direction that the defendants had no authority to disregard. The terms therefore on which the defendants held the money on the two occasions were quite distinct. On the first occasion, on the hypothesis of a mistake, they held it, not for the Pacat Corporation, but for the use of the plaintiffs, and they had no authority to pay it away to the corporation's nominees, though they in fact did so. On the second occasion they received it on behalf of the Pacat Corporation, for the Banque des Colonies, although they got the money by a mistake, having got it were entitled, when returning it to the defendants, to say for whom the defendants were to hold

(1) 2 Cowp. 565.

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it. The judge below was therefore correct in regarding the original payment to the defendants and the repayment to them as independent transactions.

Miller K.C. in reply.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered :—

BANKES L.J. By an agreement made between the appellants in London and the Pacat Finance Corporation in New York, the appellants agreed to sell to the Pacat Corporation 750,000 Belgian francs deliverable in Brussels on December 31, 1920. By the same document the Pacat Corporation agreed to sell to the appellants 12,000*l.* sterling deliverable on the same date in New York in dollars. The following arrangements were made for carrying out the transaction and disposing of the francs when paid. The Pacat Corporation instructed the appellants to pay the money to the respondents in Brussels for their account, and they instructed the respondents to receive the money and to pay it over to the Banque Industrielle de Chine, Antwerp, for account of their Paris office. The respondents arranged with the Banque des Colonies to receive the money from them and to pass it on to the Antwerp Bank. The appellants on their part instructed the Crédit Liègeois at Brussels to make the payment on their behalf to the respondents. These arrangements were all made prior to December 31, and in the early morning of that day the francs were paid by the Crédit Liègeois on the appellants' behalf to the respondents. The respondents on the same day paid the same amount to the Banque des Colonies for account of the Banque Industrielle de Chine, Antwerp. On December 30 two cables were sent from New York, one by the Pacat Finance Corporation to the appellants, the other by the agency in New York of the Banque Industrielle de Chine to the bank at Antwerp. The two cables were in the following terms : One, " With reference to our instructions for delivery . . . . 750,000 Brussels . . . . please do not make these deliveries as we are not in a position to complete transactions." The

other was from the agency of the Banque Industrielle de Chine, New York, to the Banque Industrielle de Chine, Antwerp, received December 31, 1920: "Referring our cable December 28th 750,000 British Bank Foreign Trade will not be paid." Both cables were received on December 31. On that day the appellants on receipt of the cable addressed to them telegraphed from London at 10.28 A.M. to the Crédit Liègeois instructing them not to make the payment to the respondents. The payment had already been made before the telegram was received. An attempt was made to stop the payment by the respondents to the Banque des Colonies, but this also was too late. On January 3 the Banque Industrielle de Chine, Antwerp, telegraphed to the Banque des Colonies instructing them to pay the 750,000 frs. back to the respondents. This was done, and a receipt was given acknowledging the receipt of the money "by order and for account of the Banque Industrielle de Chine Anvers." A letter of the same date was written explaining the circumstances. The letter was in these terms: "We beg to acknowledge receipt of your letter of the 31st December 1920 notifying us that you had paid to our favour with the Banque des Colonies of your City by Order of the Pacat Finance Corporation of New York for account of our Paris Office the sum of Frs. 750,000 (seven hundred and fifty thousand francs). Having regard to our having been advised by our New York Office that this payment will not be made we have this morning wired to the Banque des Colonies requesting them to repay you the said sum, assuming as we suppose that the payment in our favour was made by inadvertence." On the same day the respondents wrote to the Banque Industrielle de Chine, Antwerp, asking for instructions as to what to do with the money, and the latter by letter dated the following day informed them that the payment was made to them for the purpose of cancelling their payment of December 31 last. On receiving information that the money was in the respondents' possession the appellants demanded the repayment of it. The receiver appointed in the bankruptcy proceedings of the Pacat

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Corporation sent instructions to the respondents not to part with it, which instructions, as the corporation were debtors to a considerable sum to the respondents, the latter were no doubt very ready to obey. It was under these circumstances that the action was commenced claiming a return of the 750,000 frs. on the ground that they had been paid under a mistake of fact.

In the Court below it appears to have been almost, if not quite, conceded that the payment had been made under what the law would regard as a mistake of fact, and the question which was contested was the duty of the respondents, as agents to receive the money for the Pacat Corporation, to pay it back. In this Court both points were insisted upon. The law in reference to the right to a return of money claimed to have been paid under a mistake of fact has been considered in the case of *Kerrison* v. *Glyn, Mills, Currie & Co.* (1) As that case went to the House of Lords it is of the highest authority, and in its facts it bears a close resemblance to the present case. At p. 12 of the report in the Court of first instance, Hamilton J., as he then was, said that the key to the question in that case was whether the plaintiff, when he paid to the defendant the money the return of which was claimed, was under a legal liability to do so. If he was, then it was impossible to claim that the money was paid under a mistake of fact. I think that this test was accepted both in the Court of Appeal and in the House of Lords, and that the Court of Appeal only differed from the judge below in reference to the proper inference to be drawn from the facts. Incidentally in that case the question of what kind of mistake is accepted as a mistake of fact justifying a claim for the return of money was discussed. Fletcher Moulton L.J. (2) expresses a strong opinion that it was not enough for the plaintiff in that case, being, as the Lord Justice considered, under a liability to pay, to say that had he known that his creditor had committed an act of bankruptcy he would not have paid. On the other hand, in the House of Lords both Lord Atkinson and Lord Mersey express an equally strong view that, upon

(1) 15 Com. Cas. 1, 241; 17 Com. Cas. 41. (2) 15 Com. Cas. 248.

the assumption that the plaintiff was under no obligation to make the payment, a mistaken belief as to whether the person on whose behalf the payment was made was "a living commercial entity, able to carry on their business as theretofore," was a mistake of fact which entitled the plaintiff to claim a return of the money paid. The material fact in the present case is that on the day before the payment was made the Pacat Corporation had sent a cable to the appellants asking them not to pay the 750,000 frs. because they were "not in a position to complete transactions." This intimation clearly amounts to an offer to release the appellants from any obligation to make the payment, and when once it had been despatched it ceased in my opinion to lie in the mouth of the corporation, or in the mouth of any one representing them, to say that when on December 31 the payment was made the appellants were under a legal obligation to make the payment. Under these circumstances the expressions of opinion by Lord Atkinson and Lord Mersey to which I have referred become material, and indicate that the mistake of fact upon which the appellants rely is one which the law recognizes as a mistake justifying a demand for the return of the money paid under the mistake.

It becomes necessary, therefore, to consider the second point, and here I am unable to agree with the view of the learned judge. It is, I think, clear law that if money is paid to an agent on behalf of a principal under a mistake of fact the agent must return it to the person from whom he received it, unless before the mistake was discovered he had paid over the money he had received to his principal, or settled such an account with his principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund: see Lord Atkinson in *Kleinwort* v. *Dunlop Rubber Co.* (1) In the same case the Lord Chancellor stated the law thus: "It is indisputable that if money paid under a mistake of fact and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in

(1) 23 Times L. R. 97.

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whatever character it was received." This statement is cited with approval by Lord Mersey in *Kerrison's* case. (1) It was conceded in the present case that, assuming the payment to have been made under a mistake of fact, and the demand for the return of the money to have been made before the respondents had parted with it, it would have been no answer for the respondents to say that the Pacat Corporation or their trustee in bankruptcy objected. The argument for the respondents was founded on the assertion that when the money was returned to them it was returned to them as agents for the corporation and they held it for them, and in a different capacity from that in which they received it, and therefore there was no privity of contract entitling the appellants to require the return of the money. I doubt if the facts warrant the argument, but assuming that they do, the argument would apply equally to the first receipt of the money. The money when returned to the respondents under the circumstances under which it was returned, was held by them under precisely the same conditions as it was originally received by them, except that the instructions to pay it away had been withdrawn. Under these circumstances in my opinion the obligation which the law imposes upon an agent to return money paid to him for his principal under a mistake of fact applies in just the same way and to the same extent as it did in the interval between the first receipt of the money and the paying of it away. In my opinion the appellants are entitled to succeed. The judgment for the respondents must be set aside and entered for the appellants with costs, and the appellants must have the costs of the appeal.

WARRINGTON L.J. This is an appeal from a judgment of Sankey J. in favour of the defendants in an action for money had and received to the use of the plaintiffs.

The material facts are as follows and are not in dispute. The parties to the transaction are (1.) The plaintiffs, now in liquidation, but who were at the material time—namely, in December, 1920, and the early part of January, 1921, a

(1) 17 Com. Cas. 54.

financial house carrying on business in London; (2.) The defendants, a banking firm in Brussels acting as the agents there of the Pacat Finance Corporation, carrying on business in New York; (3.) The Pacat Finance Corporation; (4.) The Crédit Liègeois, acting in the matter as agents for the plaintiffs; and (5.) The Banque Industrielle de Chine, established at Antwerp with a branch at Paris and having as their agents in Brussels the Banque des Colonies. On December 23, 1920, the plaintiffs sold to the Pacat Corporation 750,000 Belgian francs at a price which according to a conventional rate of exchange amounted to $46,481.25, to be delivered in Brussels on December 31 to the defendants for the account of the corporation and to be paid for on the same day in New York. On December 24 the defendants were instructed by the Pacat Corporation that they would receive the 750,000 frs. and were to pay that sum to the Banque Industrielle de Chine for account of their Paris office. On December 28 the plaintiffs by cable instructed the Crédit Liègeois to pay on December 31 750,000 frs. to the defendants on account of the Pacat Corporation. On December 29 the Banque Industrielle de Chine requested the defendants to pay the 750,000 frs. to the Banque des Colonies on their account. On December 31, about 9 o'clock in the morning, the Crédit Liègeois paid 750,000 frs. to the defendants, who forthwith or very shortly afterwards paid the same sum to the Banque des Colonies on account of the Banque Industrielle de Chine at Antwerp, and received a receipt for the same from the Banque des Colonies. Meanwhile there arrived in London at 8.16 P.M. on December 30 a cablegram from the Pacat Corporation to the plaintiffs in the following terms: "With reference to our instructions for delivery . . . . 750,000 Brussels please do not make these deliveries as we are not in a position to complete transactions." In fact on the same day a petition in bankruptcy was presented against the Pacat Corporation, and a receiver was appointed who afterwards became the trustee. The cablegram of December 30 was delivered at the plaintiffs' office about 9.30 A.M. on December 31. At 10.20 A.M. on that day the plaintiffs despatched a telegram to the Crédit

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Liègeois in Brussels in the following terms: "Ours 28th. Do not make payment British Bank account Pacat Finance New York 750,000 31st. If made ask for repayment." This telegram was received at 11.20 A.M. The Crédit Liègeois then by telephone requested the defendants not to give up the sum in question, but were informed it had already been paid to the Banque des Colonies. They then wrote a letter to the Banque des Colonies asking them under the circumstances to keep the money "to such end as may be right." The steps they had taken and the result were duly reported to the plaintiffs. December 31 was a Friday. On Monday, January 3, the Banque des Colonies, acting on the instructions of their principals, the Banque Industrielle de Chine, paid back the 750,000 frs. to the defendants, who thereupon informed the Crédit Liègeois of the fact. On January 4 the Banque de Chine wrote to the defendants the following letter, according to the translation on p. 40A of the correspondence: "We have the honour to acknowledge receipt of your favour of the 3rd instant, and confirming our telephonic conversation of to-day, we beg to inform you that the payment of 750,000 frs. made to you under date 3rd January by the Banque des Colonies at Brussels, was made to you for the purpose of cancelling your payment to the same amount of the 31st December last." The translation on p. 40, though slightly different in expression, is I think substantially to the same effect. After some correspondence the writ was issued on June 27, 1921.

On these facts two questions arise:—

1. Is the case one in which the 750,000 frs. can be said to have been paid to the defendants in mistake of fact?

2. If so, did the repayment by the Banque des Colonies under the circumstances in which it was made restore the parties to the position in which they would have been had the intimation of the alleged mistake reached them before they had made the original payment to the Banque des Colonies?

Before the learned judge the plaintiffs' view that the payment by the Crédit Liègeois was made in mistake of fact was not seriously contested, but the defendants did not withdraw their contention, and before us it was insisted on.

The defendants said the payment was made under a legal liability and to the right person and therefore could not be recovered, and they relied upon the statement of the law by Fletcher Moulton L.J. in *Kerrison* v. *Glyn, Mills, Currie & Co.* (1) But the plaintiffs reply that while not disputing that the discharge of a legal obligation cannot be recalled by reason of the discovery of circumstances previously unknown which would have induced the debtor to allow himself to be sued rather than pay, on the facts of the present case the payment in question was not made in discharge of a legal obligation, for at the time of payment no legal obligation to make it existed. I think the plaintiffs are right. The contract did not create a unilateral obligation on the part of the plaintiffs. The obligations of both parties were mutual and interdependent, exactly as in the case of a contract for the sale and purchase of ordinary goods. If the plaintiffs before making the payment had received the cable of December 30 from the Pacat Corporation they would clearly have been entitled to accept it as a repudiation by them, and it is practically a necessary inference that they would have done so and have refused to make the payment. They in fact made it in the belief that the Pacat Corporation were in a position to pay and would pay the corresponding sum in dollars. Their belief was mistaken, and when they discovered the truth they were in my opinion entitled to recover the money as money had and received to their use. Assuming this to be so, the defendants, though merely agents for the Pacat Corporation, could have been sued by the plaintiffs, and their defence would have been that they had paid away the money before they knew of the mistake: see *Buller* v. *Harrison* (2), the judgment of Lord Mansfield. As matters stood in the afternoon of December 31, when they were informed of the mistake, this ground of defence would have been complete.

But then there arises for decision the second question mentioned above. Sankey J. has decided this against the plaintiffs, thinking that the transactions of January 3 were separate from and independent of those of December 31, and

(1) 15 Com. Cas. 241, 247-8. (2) 2 Cowp. 565.

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did not revive the right which the plaintiffs would have had if the money had remained in the hands of the defendants when the original payment was made by the Crédit Liègeois. With all respect, I cannot agree with this view. I think the real question is with what intent did the Banque Industrielle de Chine, through its agents the Banque des Colonies, make the repayment, and in my opinion it is clear—whichever of the two translations of their letter of January 4 be accepted—that they made it with a view to placing the defendants in the same position as they would have been in if they had not paid the money away on December 31. If this be the correct view, then as from January 3 the defendants held the 750,000 frs. as money had and received to the use of the plaintiffs.

Lastly, does the interposition of the trustee in bankruptcy make any difference? In my opinion it does not. The liability sought to be enforced is that of the defendants to whom the money was paid. It is clear on the authorities that the mere fact that they have credited it to their principals in the account between them does not relieve them of their liability: see *Buller* v. *Harrison* (1), and it occurs to me that the existence of the principals and of such rights against their agents as they may have is an irrelevant fact.

In my opinion the appeal ought to be allowed and judgment entered for the plaintiffs for the appropriate sum in sterling, with costs here and below.

SCRUTTON L.J. The real question in dispute between the plaintiffs and the defendants in this case is which of the two shall receive a sum of 750,000 Belgian francs in full, and which of the two shall only receive a dividend on that amount in the bankruptcy of Pacat Finance Corporation, an American firm, called hereafter "Pacat." The answer to this question involves the correct application of the rules governing the action for money had and received to the use of the plaintiffs on the ground of mistake of fact.

The facts are as follows: Pacat had a contract with the

(1) 2 Cowp. 565.

plaintiffs by which, in consideration of Pacat's supplying the plaintiffs with dollars in New York on December 31, 1920, the plaintiffs were to supply to the instructions of Pacat 750,000 Belgian francs in Brussels on the same day. It is not clear whether this transaction was mixed up with a transaction for similar amounts, but with the parties reversed, to be completed on January 31. Pacat wanted the Belgian francs in connection with some transaction with the Banque de Chine, as to the nature of which there was no evidence. To carry out the transaction, the plaintiffs instructed the Crédit Liègeois in Brussels to hand over on December 31 that amount of Belgian francs to the defendants, whom Pacat had instructed to receive it on their behalf. Pacat had also instructed the defendants to pay the francs when received to the Brussels representative of the Banque de Chine, who turned out to be the Banque des Colonies. On December 30, 1920, Pacat in New York stopped business, and an interim receiver was appointed by the Court. On that day, before the appointment, Pacat had cabled to the plaintiffs: "With reference to our instruction for delivery 10,000,000 Marks 2,000,000 Marks 750,000 Brussels value 31/12 please do not make these deliveries as we are not in a position to complete transactions. Pacat." It appears from a telegram from the Banque de Chine, New York, to their Antwerp branch on December 31—"Referring our cable December 28th 750,000 British Bank Foreign Trade will not be paid"—that the Banque de Chine in New York must have had a similar communication. Before, however, the plaintiffs had received their cable and had time to pass it on to Brussels, the Crédit Liègeois had paid the money to the defendants, who acting on their instructions had paid it over to the Banque des Colonies. If the payment to the defendants was under mistake of fact, there is no doubt that on their paying it over, before notice of the mistake, to or on the instructions of their principal, the defendants would no longer be liable to an action for money had and received to the plaintiffs' use: *Holland* v. *Russell*. (1)

(1) (1863) 4 B. & S. 14.

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Apparently in the Court below there was not much argument as to whether this payment was in mistake of fact, the real controversy being as to the effect of a subsequent transaction. But before us it was argued that as, if the payment were under an existing legal liability, it would not matter that it was also induced by a mistake of fact, in this case there was an existing legal liability. It was said that if Pacat's announcement that he was not going to pay dollars in New York was a repudiation of the contract, the other party might or might not accept it, when he knew of it, and until he knew of it and accepted it he was legally liable to perform it. In such a state of facts reliance was placed on the statements of the law by Hamilton J. and Fletcher Moulton L.J. in *Kerrison* v. *Glyn, Mills, Currie & Co.* (1). Hamilton J. says at p. 14: "It was contended on behalf of the defendants that if the plaintiff paid the money, being under a legal liability to pay it, he, of course, paid it to discharge his obligation under the contract and not under a mistake, and, therefore, cannot recover it. That no doubt is so." Fletcher Moulton L.J., at p. 248 of the same volume, says: "To my mind, it simply comes to this, that the plaintiff paid money due from him without knowledge that an act of bankruptcy had been committed, and certainly that is not sufficient ground for getting it back. The mere fact that if he had known that an act of bankruptcy had been committed he would not have paid this money, but would have allowed himself to be sued or allowed the trustee to enforce whatever rights he might have, is certainly not a ground for recovering back this money. The plaintiff paid it, in my opinion, under a legal liability, to the right person." I am not sure that these statements of the law quite take into account such cases as *Standish* v. *Ross* (2), where the sheriff, who had paid under a legal liability at the time he paid, recovered because a subsequent event, by relation back, had made his payment no longer a legal liability. But no doubt it must be considered whether there was liability of the plaintiffs to pay at the time the payment was made. I think the payment of dollars in New York, and payment of francs in

(1) 15 Com. Cas. 1, 241, 248. (2) (1849) 3 Ex. 527.

Brussels, were intended to be concurrent, each a condition of the other. Each party had till the end of the business day to make them, but I do not think the law would split up the day and say that a payment on the day, but before its end, was without legal liability. Nor do I think the law would introduce the doctrine of relativity so as to take notice of the fact that owing to difference of position the day in New York ended after the day in Brussels. In my view each payment was a condition of the other, and the plaintiffs were not bound to pay francs in Brussels unless Pacat paid dollars in New York. If so Pacat on December 30 sent a communication to the plaintiffs that he was not going to pay dollars on the due date, and did not in fact pay them. He announced that he was not going to perform the condition, and did not perform it. The plaintiffs paid in ignorance of the fact of the announcement and of the non-performance. In my opinion this is not payment under a legal liability. They were not liable to pay on December 31, because the condition of the liability was not performed, and they had not waived its performance. Take as an illustration an ordinary condition precedent: A ship is chartered on December 20, "now in the Port of Amsterdam" (1), the first payment of time freight on January 1. The ship was not on December 20 in the port of Amsterdam, but the charterer did not know of it until January 10. Was he liable on January 1 to pay the freight? I think not. The condition of liability was not fulfilled and the charterer had not waived it. So here in my opinion on December 31 Pacat had not performed, and had stated their intention not to perform, and the plaintiffs had not waived performance. For these reasons I agree with the view on which the judgment below proceeded, that there was an original payment under a mistake of fact.

But now come the facts that create the difficulty. The Banque de Chine, who had sent the cable (p. 20 of the correspondence), that the francs would not be paid, on learning that they had been paid to the Banque des Colonies instructed that bank to repay them. This appears on pp. 32, 31 and 40A.

(1) *Behn* v. *Burness* (1863) 3 B. & S. 751.

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On p. 32 the Banque de Chine wired the Banque des Colonies "Kindly pay back 750,000 payment made by mistake for our account by British Bank Foreign Trade." On p. 31 is the letter: "Having regard to our having been advised by our New York Office that this payment will not be made we have this morning wired to the Banque des Colonies requesting them to repay you" (that is the British Bank for Foreign Trade) "the said sum, assuming as we suppose that the payment in our favour was made by inadvertence." On p. 40A the Banque de Chine again write to the Bank for Foreign Trade: "We beg to inform you that the payment of 750,000 frs. made to you under date the 3rd January by the Banque des Colonies at Brussels was made to you for the purpose of cancelling your payment to the same amount of the 31st December last." The Banque des Colonies on January 3 accordingly repaid the money to the defendants, who acknowledged the receipt, p. 34: "We beg to inform you that the Banque des Colonies Brussels have to-day paid us for your account 750,000 frs. in respect of which we note your instructions," and very properly informed the Crédit Liègeois of the receipt, p. 35: "We beg to inform you that the Banque des Colonies Brussels, have repaid to us by order of the Banque Industrielle de Chine, Antwerp, without further advice 750,000 frs. This for your information." On January 5, the receiver of Pacat instructed the defendants not to part with any Pacat money and to receive for his account any payment due to Pacat. In fact what happened was that the defendants credited Pacat in account in their books, thus reducing the amount he owed them, but getting the amount credited in full instead of only a dividend on the amount.

The learned judge below has taken the view that this repayment is a fresh and separate transaction which does not revive the liability which the defendants were no longer under when they paid away to, or by instructions of, their principal the money they had received under a mistake of fact. The position is curious and novel, but on consideration I am unable to agree with this view. The defendants had paid the Banque des Colonies under a mistake of fact, and the Banque de Chine

to whom they paid, recognizing this mistake, had rectified it by cancelling the transaction and putting back the money where it was before the mistake. In my opinion this leaves the defendants where they were before they paid the money to the Banque des Colonies. Then in my opinion they were bound to repay the plaintiffs through the Crédit Liègeois, and the fact that Pacat said "Do not repay" would have been no answer. The liability was a personal liability of theirs, arising, as Collins L.J. put it in *Continental Co.* v. *Kleinwort* (1), because they personally "had the benefit of a windfall and must restore it to the true owner." When they paid it away, "they were a mere conduit pipe and had not had the benefit of the windfall." But where no valid transaction having intervened, but only a mistaken flow in the conduit pipe, the error of flow is corrected, and the money returns to them, they have again "the benefit of the windfall, and must return it to the source from which it originally came through a mistake of fact." Just as it would be no answer to their original liability to say "Pacat forbids me to repay it," because the liability is theirs as holders as well as Pacat's, so in my opinion it is no answer to say that "the trustee of Pacat forbids me to return it," for the liability is their personal liability as "holders of the windfall."

For these reasons, after careful consideration of the arguments of counsel, for which I personally was much indebted, I am of opinion that the appeal should be allowed and judgment entered for the plaintiffs for the English equivalent of 750,000 Belgian francs with costs here and below.

Appeal allowed.

Solicitors for the appellants: *H. Hilbery & Son.*
Solicitors for the respondents: *Roney & Co.*

(1) (1904) 9 Com. Cas. 240, 248.

J. F. C.

Applied. BAXTER v. ECKERSLEY. [1950] 1 All E.R. 139.

Applied. BAXTER v. ECKERSLEY [1950] 1 K. B. 480

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[IN THE COURT OF APPEAL.]

DEXTERS, LIMITED *v.* HILL CREST OIL COMPANY (BRADFORD), LIMITED.

Alternative Claims—Election—Award—Alternative Findings—Special Case—Order of Court—Payment made and accepted—Appeal—Approbating and Reprobating.

In an arbitration concerning a dispute between the parties to a contract of sale of certain goods, which were also the subject of a series of sub-sales, the umpire stated a special case in which he made three different awards, leaving the Court to decide which was right. The first two awards were made on the footing that the sellers were liable to the buyers for breach of contract in that the goods did not answer the description in the contract; the second award was for a considerably larger sum; the third was made on the footing that there had been no breach of contract. The judge in the King's Bench Division having decided that the first award was right, the buyers demanded and obtained payment of the amount of that award and gave a receipt therefor. They then appealed from the decision of the judge and contended that the second award was the right one.

Upon a preliminary objection to the appeal:—

Held, that having demanded and accepted payment under the first award the appellants were precluded from contending that it was wrong.

Upon the merits,

Quaere, whether the second award could be right. It was for a sum equal to the amount recovered by the ultimate purchasers in the series from their vendors, but the goods in that case were sold under a description differing from the description in the first contract and indicating goods more valuable than such as would answer the description in that contract.

Decision of Roche J. affirmed.

APPEAL from the decision of Roche J. upon a special case stated by an umpire under s. 7 of the Arbitration Act, 1889, in an arbitration under a submission contained in a contract for the sale of goods.

By a contract in writing dated August 13, 1923, between the Hillcrest Oil Company (Bradford), Ld. (hereinafter called the Hillcrest Co.), and Dexters, Ld., the Hillcrest Co. agreed to sell and Dexters, Ld., agreed to buy "250 tons of dark cotton seed grease as per sample No. 9536." The contract contained a clause referring disputes to arbitration. Dexters, Ld., claimed damages from the Hillcrest Co. for

breach of contract. The parties appointed arbitrators, who failed to agree, and thereupon appointed an umpire. He having been requested by Dexters, Ld., to state a special case under s. 7 of the Arbitration Act, 1889, made his award in the form of a special case as follows :—

By the contract of August 13, 1923, a copy of which is annexed and forms part of this case, the Hillcrest Co. sold to Dexters, Ld., in the words of the contract, " Description of goods—Dark cotton seed grease as per sample No. 9536. Sampling and analysing by Norman Tate & Co. of Liverpool. Quantity—250 tons. Price—9*l.* per ton on a basis of 95 per cent. fatty matter soluble in carbon bisulphide. Place of delivery—Free alongside ship, Liverpool. Time of delivery —About the middle of August. Packages—Sound iron-bound barrels included. Payment—Net cash 14 days from delivery, or cash against delivery if required, less interest at 5 per cent. per annum."

Dexters, Ld., sold the goods to Napier & Co. of London, and Napier & Co. sold them to Donald Campbell & Co. of London.

Donald Campbell & Co. shipped 450 barrels = 75 tons, on the steamship *Carmania* to New York on August 23 and 450 barrels on the steamship *Siam City* to the same destination on September 7, and 600 barrels = 100 tons, on the steamship *Brescia* to Genoa on September 4.

On August 27 and September 18 Norman Tate & Co., mentioned in the contract of August 13, issued certificates of analysis. They stated that the samples contained 98 per cent. of matter soluble in carbon bisulphide. To the analysis of the sample from the *Carmania's* shipment they appended the remark: " The material has not the usual appearance of black cotton seed grease. It is very viscid." They described each of the samples from the shipments on the *Siam City* and the *Brescia* as " a viscid substance of dark, almost black, colour."

The firms in New York and Genoa to whom Donald Campbell & Co. had sold the goods under the description of black cotton seed grease, good merchantable quality, rejected them on the ground that they consisted not of grease but

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mostly of pitch. An arbitration was held between Donald Campbell & Co. and Napier & Co. The umpire in that arbitration, Mr. A. J. Dodd, after taking the opinion of the Court upon a case stated under s. 19 of the Arbitration Act, 1889, awarded damages against Napier & Co. amounting to 3745*l.* 2*s.* 5*d.* Dexters, Ld., had agreed to treat any award made in that arbitration as binding upon themselves, and they accordingly paid the amount awarded.

Dexters, Ld., invited the Hillcrest Co. to take part in the arbitration between Napier & Co. and Donald Campbell & Co. to protect their interests. The Hillcrest Co. declined, but agreed to give Dexters, Ld., all assistance necessary to contest the claim. They were informed by Dexters, Ld., of the sittings of the arbitration and were invited to attend and give evidence, but they did not do so. The contract in that case was in essential particulars the same as the contract of August 13 above mentioned. In particular the description "dark cotton seed grease" was applied to the goods. The price was substantially higher and the basis on which the cost was worked out was 98 per cent. instead of 95 per cent. of fatty matter.

In the course of the arbitration between Dexters, Ld., and the Hillcrest Co. (the subject of this appeal) evidence was adduced to show that the original raw material from which the article sold had been produced was true black cotton seed grease or cotton seed oil mucilage, which is the same substance in an earlier stage of preparation. It had been manufactured by J. Bibby & Sons, Ld., of Liverpool, and supplied by them to the Hillcrest Co. for the purpose of distillation. When the material had been so treated the Hillcrest Co. delivered back the distilled grease to J. Bibby & Sons. They also delivered back the residue under the description "soft pitch." They subsequently bought back this soft pitch from J. Bibby & Sons in order to sell it to Dexters, Ld. J. Bibby & Sons delivered the goods to the steamers and invoiced them to the Hillcrest Co. as "soft cotton pitch"; and the Hillcrest Co. invoiced them to Dexters, Ld., as "dark cotton seed grease."

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" Dark cotton seed grease " is not an ordinarily recognized trade term. Nevertheless the umpire in the arbitration between Napier & Co. and Donald Campbell & Co. decided that the goods delivered did not conform to the description, which he found to be a description clearly understood by both parties for the purpose of the contract. He thought, however, that Donald Campbell & Co. ought not to reject the goods, but should be content with damages.

The special case, after setting out the facts as above, stated the questions for the opinion of the Court and the alternative awards of the umpire, according as the Court should decide, as follows :—

" 14. I hold that the article delivered by the sellers did not comply with the description in the contract, and that they are liable in damages for breach of contract. I further hold that the damages should not be assessed on the basis of the amount which the buyers had to pay to their sub-purchasers under the award of Mr. A. J. Dodd, but should be assessed on the basis of the difference between the value of the goods actually delivered and the goods called for by the contract.

" 15. Subject to the opinion of the Court on any question of law arising I award and direct that the buyers are entitled to recover from the sellers the sum of 2000*l.* and no more as damages. I assess the costs of this award and special case at the sum of 158*l.*, of which amount I direct that the sellers shall pay the sum of 32*l.* and that the buyers shall pay the balance of 126*l.*, and I further direct that each party shall pay their own costs of the arbitration.

" 16. If the Court is of opinion on the facts above stated that the damages should be assessed on the basis of the amount which the buyers had to pay to their sub-purchasers then I award that the buyers are entitled to recover from the sellers the sum of 3745*l.* 2*s.* 5*d.*, together with 227*l.* 10*s.* 9*d.*, the costs including arbitrators' fees incurred by them in defending the claim in the previous arbitration and that the costs of this award and special case shall be borne and paid as to 32*l.* by the sellers and as to 126*l.* by

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the buyers and that each party shall pay their own costs of the arbitration.

"17. Should the Court be of opinion on the facts above stated that the sellers have committed no breach of contract or that the buyers are not entitled to damages then I award that the buyers are not entitled to recover anything from the sellers, and I direct that they pay the whole of the costs of this award and special case amounting to 158*l.* and that each party shall pay their own costs of the arbitration.

"18. The costs of the arguments of this special case I leave to the discretion of the Court.

"Dated this 27th day of May, 1925. Signed J. W. Pearson."

The special case was heard by Roche J., who decided in favour of the first award and ordered judgment to be entered for Dexters, Ld., the buyers, for 2000*l.* in accordance with para. 15 of the case.

Dexters, Ld., appealed.

Campion K.C. and *R. L. Parry* for the appellants having opened the appeal and having contended that the ultimate buyers had not rejected the goods for any difference in quality between black cotton seed grease and dark cotton seed grease, but on the ground that the goods were not grease at all, but pitch—

Le Quesne K.C. and *J. Dickinson* for the respondents. The appellants have precluded themselves from appealing from the decision of Roche J. The day after that decision their solicitors wrote to the respondents' solicitors: "We shall be glad if your clients will now let us have remittance for 2032*l.* pursuant to the award as upheld by the judge yesterday." After a second application had been made for payment, the respondents' solicitors replied on August 21, 1925, "We have now received and send you herewith our clients' cheque payable to your clients for 2032*l.* payable pursuant to the umpire's award." On August 25 the appellants' solicitors sent a receipt for the amount. Four days afterwards they served notice of appeal. Having accepted payment under the first alternative award, and thereby recognized and

adopted it as a good and valid award, they cannot now be heard to contend that the second award is the one which the Court ought to have upheld and that the first is wrong. This appeal is an attempt to blow hot and cold, to approbate the first award by accepting a benefit under it and then reprobate it for the purpose of obtaining a further benefit: *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* (1)

Moreover the appeal ought to fail on the merits, because the contract between Napier & Co. and Donald Campbell & Co. was for the sale of black cotton seed grease, a well known article of commerce, and the price was computed on the basis that the goods contained 95 per cent. of fatty matter, while the contract between the Hillcrest Co. and Dexters, Ld., was for dark cotton seed grease, which is not a description recognized in any trade, and the percentage of fatty matter, upon which the price was calculated, was 98 per cent. Therefore the damages recovered in the two contracts cannot be commensurate.

Campion K.C. in reply. This is not an instance of approbating and reprobating. An appeal does not operate as a stay of execution: Rules of the Supreme Court, 1883, Order LVIII., r. 16. A party may appeal from a judgment, on the ground that he is entitled to more than the judgment awards, and issue execution upon it and so obtain part payment of what he is entitled to. So long as he has only obtained satisfaction pro tanto there is nothing to preclude him from prosecuting his claim for satisfaction in toto.

BANKES L.J. This is an appeal from the decision of Roche J. on a special case, which raised three questions: First, whether the appellants were entitled to any damages at all; secondly, whether they were entitled to 2000*l.* damages as the result of applying the proper measure of damages in this particular case; and thirdly, whether they were entitled to 3745*l.*, instead of 2000*l.*, on the ground that a different measure of damages ought to be applied. The umpire in para. 15 of the special case has said: "Subject to the opinion

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of the Court on any question of law arising, I award and direct that the buyers "—the appellants—" are entitled to recover from the sellers the sum of 2000*l.* and no more as damages." In para. 16 he went on to say: "If the Court is of opinion on the facts above stated that the damages should be assessed on the basis of the amount which the buyers had to pay to their sub-purchasers, then I award that the buyers are entitled to recover 3745*l.* 2*s.* 5*d.*" In para. 17 he says: "Should the Court be of opinion . . . . that the sellers have committed no breach of contract, or that the buyers are not entitled to damages, then I award that the buyers are not entitled to recover anything." The matter then came before Roche J., who decided against the sellers that they had committed a breach of contract, and in favour of the buyers that the amount of damages to which they were entitled was 2000*l.* and not 3745*l.* 2*s.* 5*d.*

Now if the sellers had refused to pay the 2000*l.* upon the request which was made to them on July 29, after the decision of Roche J., the proper course for the buyers to take would have been to get an order to enforce the award. If such an order had been made it is inconceivable that they could then turn round and appeal, insisting in substance that in awarding the sum of 2000*l.* the umpire had applied an entirely wrong measure of damages, that he ought to have awarded 3745*l.* on a totally different measure of damages, and that the learned judge ought so to have held. That is to all intents and purposes what the appellants are asking this Court to say, for there is no material difference between accepting payment under an order because the opposing party will not pay until an order is made and accepting payment without an order because in the circumstances an order is unnecessary. Whatever else their rights may be I am quite clear that having taken the 2000*l.* the appellants cannot now be heard to say that the award under which they took the money was based on a wrong view of the law. The appeal therefore fails on this preliminary point.

But it may be some satisfaction to the appellants to know that in view of the materials before us the umpire seems to

have been clearly right in holding that he could not accept the amount awarded in the former arbitration as the measure of damages in the present one. It is uncertain how that amount was arrived at; the claimants in that arbitration had sold the goods under a description which represented them as above their agreed value; they claimed 6000*l.* and were awarded 3745*l.*, but upon what grounds we do not know. In these circumstances it is impossible to apply the amount recovered by a sub-purchaser as the measure of damages recoverable against the original seller. It is not necessary to decide this point, since we are dismissing the appeal upon the preliminary point, but in so doing it is some satisfaction to know that the merits appear to tend to the same conclusion.

WARRINGTON L.J. I am of the same opinion. The appellants are seeking to approbate and reprobate at the same time, which they cannot do. This special case is not merely a case stated for the opinion of the Court. It is an award in the form of a special case. In reality the umpire has made three alternative awards, and the fact that there is a third award may be important for reasons which I will point out directly. The three alternative awards are in this form: "Subject to the opinion of the Court on any question of law arising I award and direct that the buyers are entitled to recover from the sellers the sum of 2000*l.* and no more." Then there are directions concerning costs. The second alternative is: "If the Court is of opinion on the facts above stated that the damages should be assessed on the basis of the amount which the buyers had to pay to their sub-purchasers, than I award that the buyers are entitled to recover from the sellers the sum of 3745*l.* 2*s.* 5*d.*, together with 227*l.* 10*s.* 9*d.*, the costs incurred by them in defending the claim in the previous arbitration"—and then there is a direction about the costs of the present arbitration. The third award is made in the event of the Court being of opinion that the sellers have committed no breach of contract and that the buyers are not entitled to damages; in that event the umpire

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awards that the buyers are not entitled to recover anything from the sellers; and different directions are given on the matter of costs. There are three alternative awards, any one of which may be the ultimate award according as the Court decides in favour of one or another. The Court decided in favour of the first award. Owing to the way in which the matter was brought before him, the decision of the learned judge takes the form of an order that the motion to set aside the award be dismissed with costs to be taxed by a taxing Master, but the effect of that order is that the award shall be in the form of the first of the alternative awards.

The object of this appeal is to induce the Court to decide in favour of the second alternative award, and if the appeal were to succeed the result would be that the second of the alternative awards would be substituted for the first. The learned judge having decided that the first was the right one the solicitors for the appellants, the buyers, write to the other side: "We shall be glad if your clients will now let us have remittance for 2032*l.* pursuant to the award as upheld by the judge yesterday"; that is to say, the first of the three alternative awards being the award of the umpire, we now ask you to make the payment pursuant to that award. The respondents answer: "We have now received and send you our clients' cheque payable to your clients for the sum of 2032*l.* payable pursuant to the umpire's award," and they ask for a receipt. The effect of that letter seems to me to be twofold. The writer acts on the assumption that the first of the alternative awards is the right one and, acting on that assumption, the person who paid the money is debarred from saying that the third alternative is the one to be adopted. It is here that the importance of the third award appears. The receipt which was given by the appellants on receiving the cheque was in the form "Received," etc., "in payment of the amount payable under the umpire's award in the arbitration between us." That was on August 24. Within five days they give notice of appeal. It seems to me perfectly hopeless to contend that they are entitled to give that notice of appeal after they had deliberately accepted the first

alternative award as the award of the umpire, and put their opponents in the position of having debarred themselves from contending that the third award was the right one.

It seems to me therefore that the preliminary objection ought to succeed and that the appeal should be dismissed on that ground. But, like Bankes L.J., I think it may be satisfactory to the parties to know that in my view the appeal would have failed on the other ground. It appears that Messrs. Donald Campbell & Co. sold to their buyers under the description of "black cotton seed grease," a recognized trade description, and not under the description applied to them in the contract in question in this case—namely, "dark cotton seed grease," which is not a recognized trade description. We do not know how the sum of 3745*l.* 2*s.* 5*d.* awarded in the previous arbitration, and claimed in this arbitration, was arrived at. The buyers in that case seem to have claimed 6000*l.* It is at least possible to say that the award in the former case was not upon the same footing as that in the present case. If that is so the damages in the former case cannot flow from the breach of contract in the present case, and this appeal must have failed on that ground also.

SCRUTTON L.J. This appeal is upon the measure of damages for breach of a contract for the sale of goods; but a preliminary point has been taken, which is of considerable general importance. The umpire in an arbitration, having three possible measures of damages submitted to him, awarded on the basis of one of them 2000*l.* and no more; alternatively, supposing he was wrong in adopting that measure of damages, and that another was the right one, he awarded 3745*l.*; he rejected the contention that there was no liability. Thereupon the buyers, in whose favour the sum of 2000*l.* had been awarded, proceeded to reap the fruits of the award—he had not got a judgment for that amount, but he might have got one by applying for leave to enforce the award. He wrote to the other side demanding 2000*l.* under the award. That involved the assertion that the award was right. He could hardly have taken up the position: "The award is wrong,

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but pay me under it." He asked for 2000*l.* under that award and got the 2000*l.* and gave a receipt for it in satisfaction of that award. Then he turned round and said: "The award under which I got the 2000*l.* is wrong. I am going to appeal against it and contend that the other alternative is the right one and ought to be enforced and I ought to have 3745*l.* 2*s.* 5*d.*" That is the same thing as saying first: "I approbate this award and claim a benefit, 2000*l.*, under it; pay me that 2000*l.*"; and then when he has got it, saying: "I reprobate this award and say it is wrong and ask you to substitute another award under which I ought to have 1745*l.* 2*s.* 5*d.* more." It has often been stated as the law that you cannot approbate and reprobate the same act; you cannot take advantage of a document or a right under it and at the same time say it is not a document which binds you. For instance, you cannot take a benefit under a will and at the same time say it is invalid, or take a benefit under a conditional agreement and repudiate the condition. In the same way it was held in *Verschures Creameries, Ld.* v. *Hull and Netherlands Steamship Co.* (1) that you cannot recognize as valid the delivery of goods and then say the delivery was wrongful. So, in my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad. Mr. Campion attempted to apply what seems to me to be an ingenious perversion of the rule that an appeal is no stay of execution under a judgment; consequently, he argues, he may issue execution on a judgment and then appeal from it. I have always understood that rule as directed against the party who is appealing, and not in his favour; the fact that he is appealing does not operate as a stay of execution against him. It startles me to hear it argued that a person can say the judgment is wrong and at the same time accept payment under the judgment as being right. That seems to me a misapplication of the rule, and for the same reason I think the appellants who have acted on the award by taking money under it have debarred themselves from appealing against it and saying it was wrong.

(1) [1921] 2 K. B. 608.

But, so far as I can see, the appellants could not have relied on the damages recovered in the former arbitration as the measure of damages for the breach of contract which gave rise to the present appeal. Those cases where there has been a chain of sales and sub-sales often present complications and difficulties, but one point I have always understood as clear—namely, that in order to make a sum recovered for breach of the last contract in the chain the measure of damages for a similar breach of a contract higher up in the chain, it is essential that the contracts along the chain connecting them should be the same. Where, as here, the earlier contracts are for the sale of goods under one description, and that not an ordinary trade description, and at some link in the chain the description varies, and becomes a well known trade description, I find it difficult to hold that the amount recovered for a breach of the last contract in the chain can be made the measure of damages for a breach of the first. I am not expressing a final opinion on this point, because I have not heard all the argument that might be brought to bear upon it, but it may be some satisfaction, though perhaps not much, to those who are losing on the preliminary point to reflect that they would probably have lost on the main point.

Appeal dismissed.

Solicitors for appellants: *Swepstone, Stone & Co.*
Solicitors for respondents: *Hyman Isaacs, Lewis & Mills.*

W. H. G.

1925
Dec. 14.

DUNBAR *v.* SMITH.

Landlord and Tenant—Rent Restriction—House on three Floors each let separately—One Floor coming into Possession of Landlord after July 31, 1923—*Decontrol—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2.

If different parts of a building are let separately as dwelling-houses, each of those parts, if the rent is within the statutory limits, is "a dwelling-house to which the principal Act applies" within s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and therefore, if the landlord comes into possession of any one of them, that part becomes decontrolled by virtue of the said sub-section.

APPEAL from Clerkenwell County Court.

On an application by Dunbar (hereinafter called "the tenant") for an apportionment of the rent of the first floor of 50 Pemberton Gardens, Highgate, it appeared that all three floors of which the house consisted were separately let in August, 1914, the first floor, on which there were three rooms, being let at a rent of 10*s.* per week. In 1916 that floor was let to a Mrs. Putnam, who remained occupier till November, 1923. Smith (who was treated in the county court as the freeholder and is hereinafter referred to as "the landlord") then went into possession of that floor, executed certain repairs, and at the end of fourteen days let it at a weekly rent of 1*l.* to one Sharp, who continued in occupation till May, 1924, when he was succeeded by the present tenant, who paid a weekly rent of 22*s.* 6*d.* At least one notice of increase of rent had been served in 1920 in respect of that floor.

On the hearing of the application, the landlord contended (*a*) that by virtue of s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923 (1), the first floor had become

(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house

Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act

decontrolled, and (*b*) that the standard rent within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was 10*s*. per week in August, 1914, and therefore no apportionment was necessary.

The county court judge held that, although the landlord had been in possession of the first floor for fourteen days in November, 1923, that floor did not thereby become decontrolled. In his opinion possession of that floor was not "possession of the whole of the dwelling-house" within s. 2, sub-s. 1, of the Act of 1923, as that phrase meant for the purposes of this case the whole of the structure 50 Pemberton Gardens—namely, the whole of the ten rooms contained in that building. He also held that the standard rent of the first floor was 10*s*. per week.

The landlord appealed.

Merriman K.C. and *R. J. Sutcliffe* for the landlord. Sect. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, makes it quite clear that where the landlord of a house comprising several dwelling-houses obtains actual possession of one of the dwelling-houses comprised in the larger structure, that part becomes decontrolled. The sub-section applies to any separate dwelling which comes within the Act of 1920. The county court judge was wrong in holding that the proviso to the sub-section prevented decontrol in a case such as this. The proviso does not qualify the enacting part of the sub-section; it relates only to the position where there has been sub-letting of part of a dwelling-house. The first floor having become decontrolled, there was no ground for the claim for apportionment.

Phineas Quass for the tenant. The county court judge was right in deciding that the opening words of s. 2, sub-s. 1, of the Act of 1923 relate only to the whole structure where

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applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sublet, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act. . . . ."

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it includes several dwelling-houses; it does not contemplate that a house may be in part controlled and in part decontrolled. In any event, however, as it was merely assumed that the landlord, Smith, was the freeholder, and it is doubtful whether he is not merely a tenant, the Court should not decide that part of the house became decontrolled without knowing definitely the position of the landlord. If he is merely a tenant the proviso to s. 2, sub-s. 1, will apply.

BANKES L.J. In this case the question is whether the judgment of the county court judge can be supported upon the facts presented to him. The matter came before him on an application for apportionment, and it was proved that the first floor of this house had been a dwelling-house within the meaning of the Acts ever since they had been in operation. In those circumstances it follows that no question of apportionment could arise, because, if the Acts apply to this floor of this house, it had a standard rent, and that would have been sufficient to dispose of the application for apportionment; but it is not sufficient to dispose of the matter decided by the judge, for the point was taken that there could be no apportionment, because the floor of this house occupied by the tenant had become decontrolled, and that question was dealt with by the judge as a matter of law.

The house, 50 Pemberton Gardens, consisted of three floors, and ever since 1914, and indeed before 1914, those three floors had been let separately, and they so continued. Shortly after the passing of the Rent and Mortgage Interest Restrictions Act, 1923, the first floor, the one now in question, became vacant, and the landlord, who in the Court below was treated for all purposes as the owner, obtained actual possession, executed certain repairs, and then relet the floor to the present tenant. In those circumstances the tenant is estopped from saying that the landlord is not in fact the landlord.

No point was taken in the county court as to his exact position, and I think it must be taken for the purposes of this case that he was the freeholder. When the question as to

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the exact position of a landlord arises it may be necessary to consider the point raised by Mr. Quass; here it does not arise. The sole question is whether the first floor of this house has become decontrolled. The judge held that it was not decontrolled, because, in his view, s. 2, sub-s. 1, of the Act of 1923 applies only where the whole structure, whether it consists of one or a number of floors, has come into the actual possession of the landlord. With great respect for the opinion of the judge, who has much experience in these matters, I do not take the same view. It is necessary to bear in mind that the whole scheme of these Acts rests upon the possibility of a structure becoming, for the purpose of the Acts, a number of dwelling-houses, and when s. 2, sub-s. 1, speaks of "the landlord of a dwelling-house to which the principal Act applies," it is referring definitely to what the Act of 1920 prescribes shall be deemed to be a dwelling-house; that is to say, any part of a house separately let the rent of which is within the statutory limit. The judge has read s. 2, sub-s. 1, as though therein the draftsman is drawing a distinction between a dwelling-house to which the Act applies and the whole of the structure of which that dwelling-house forms part. I cannot accept that construction. It seems to me that when the section speaks of "a dwelling-house to which the principal Act applies" and of "the whole of the dwelling-house" it is speaking of the same thing. Whether it is in fact the whole structure or whether it is in fact a part only of the whole structure depends upon whether it comes within the definition of a dwelling-house for the purposes of the statute. The judge went on to refer to the proviso as supporting his view. If the proviso is to be taken into consideration at all, and I think it should be, it assists the view that the sub-section is dealing only with the one particular dwelling-house, and is not drawing the distinction which the county court judge thinks it does. I think the reason why the expression "the whole of the dwelling house" is introduced into sub-s. 1 is because the draftsman realized that in order to meet certain contingencies he would have to make specific provision

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as to part of the dwelling-house; the sub-section therefore opens with a provision in which reference is made to the whole of the dwelling-house, but that is in anticipation of the proviso which deals with part of the house. The proviso is concerned with sub-letting; it deals with the case of a tenant of part of the house sub-letting certain rooms of that part. I am unable to agree with the county court judge's construction of the section. In my view this first floor has become decontrolled, and this appeal must therefore be allowed.

SCRUTTON L.J. Whatever confidence I may have in my own judgment in other branches of the law, I never give a decision upon the Rent Restriction Acts with any confidence, and in this particular case, where we are differing from a county court judge of great experience in the working of the Acts, my diffidence is increased; but in the view I take of s. 2, sub-s. 1, of the Act of 1923, I think the judge came to a wrong conclusion. He had before him an application to apportion the rent of a dwelling-house to which the Acts apply. One of the landlord's answers was that the subject matter was not a dwelling-house to which the Acts apply, because as the floor in question had been in his actual possession it had passed out of the Acts by virtue of s. 2, sub-s. 1, of the Act of 1923. Mr. Quass has contended that a fundamental point which ought to have been, but was not, gone into at the trial would show that the county court judge was right. We cannot however allow an appeal from a county court on a point which was not taken in the county court. Therefore, while I appreciate that Mr. Quass's point—namely, that Smith was himself a tenant holding from a landlord—may possibly, subject to the proper application of the authorities as to estoppel, raise difficulties in other proceedings, we must in this case proceed upon the basis that the landlord was the owner of this house and, as such, took possession of the first floor. The house as a whole consisted of three floors, which had been separately let since 1914, but in 1923 the first floor fell into the actual possession of the landlord, who

maintained that under s. 2 of the Act of 1923 the Acts ceased to apply to that floor. To that it was said by the county court judge that in order that that result might follow, it is not enough that the landlord should be in possession of that floor, he must be in possession of the whole house of which that floor forms part. I am unable to take that view of s. 2, sub-s. 1. In that sub-section I read the words "is in possession of the whole of the dwelling-house" as referring to what is described earlier in the sub-section as the "dwelling-house to which the principal Act applies." Here the dwelling-house to which the principal Act applied was the first floor of 50 Pemberton Gardens. The proviso seems to have been inserted to meet the case where there is a landlord, a tenant and a sub-tenant. The first part of the proviso enacts that although the tenant may take possession as against the sub-tenant, that does not entitle the landlord to say that the portion which had been sublet is thereby taken out of the Act. The effect of the second part of the proviso is that if the landlord, as against a tenant, obtains possession of one part of the premises he had let but does not obtain possession of the other part because it is sublet, the part of which he obtains possession is taken out of the Act, while the other part let to the sub-tenant continues within the Act.

Appeal allowed.

Solicitor for landlord: *Herbert A. Phillips.*
Solicitors for tenant: *H. W. Henniker Rance & Co.*

J. S. H.

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[1924. L. 943.]

Insurance—Jewellery—"Theft"—Larceny by a Trick—Jewellery handed to Customer to be shown to Others—Theft by Customer—Exemption from Liability for Dishonesty of "customer . . . . in respect of goods entrusted to" her.

The plaintiff, a jeweller, was insured under a Lloyd's policy against "theft" of jewels. The policy contained a clause exempting the insurers from liability in the case of "loss by theft or dishonesty committed by any . . . . customer . . . . in respect of goods entrusted to [her] by the assured." A woman, E. E., one of the plaintiff's customers, with intent to steal them, induced the plaintiff to let her have two pearl necklets by fraudulently pretending that she wanted them for the purpose of showing them to two persons in fact non-existent, for their approval, with a view to purchase by them. The plaintiff did not empower E. E. to pass the property in the necklets. E. E. disposed of the necklets for her own benefit:—

Held, that E. E. was guilty of larceny by a trick, and that the larceny was "theft" within the meaning of the policy, and that the defendants were not protected against liability under the above clause, inasmuch as it only applied where the goods were delivered to a customer as such, and that the pearls were only delivered to E. E. as an agent or messenger for the purpose of showing them to others who might or might not become customers.

ACTION tried before McCardie J.

The plaintiff, trading as John Ellett Lake & Son, jewellers, of Exeter, claimed 1450*l.* from the defendant, a Lloyd's underwriter, for the loss of jewellery, under a policy of insurance (N. A. G. policy No. G 44,566) dated December 28, 1922, insuring them against theft. The facts and the relevant provisions of the policy, which are summarized in the headnote, are fully set out in the judgment, together with the arguments on both sides.

Jowitt K.C., *J. B. Melville* and *Marjoribanks* for the plaintiff.

Stuart Bevan K.C. and *van den Berg* for the defendant.

Cur. adv. vult.

1925. Dec. 4. MCCARDIE J. read the following judgment. The plaintiff is a jeweller in High Street, Exeter. The

defendant is an underwriter at Lloyd's. The action is brought on a policy of insurance dated December 28, 1922. The points at issue were ably argued by Mr. Jowitt K.C. and Mr. J. B. Melville for the plaintiff, and by Mr. Stuart Bevan K.C. and Mr. van den Berg for the defendant.

The claim is in respect of the loss of two pearl necklets, one with 121 pearls, valued at 750*l.*, and the other with 139 pearls, valued at 700*l.* The questions before me turned (inter alia) on the effect of particular words and phrases, and also on the general scope and effect of the policy. As stated by counsel, the questions are deemed to be important by jewellers and by underwriters.

In view of the arguments it is well to set out with some fullness the more material contents of the policy. It is headed "Lloyd's Insurance Policy." It then recites the proposal and the payment of the premium (of 60*l.*) "or consideration to us who have hereto subscribed our names . . . . to insure him [the plaintiff] against the risks of loss and/or damage by fire, burglary, robbery, theft, accident, from whatsoever cause or misadventure to/of the property herein specified, or any part thereof, from the premises herein mentioned or elsewhere, and/or whilst in transit by post, railways, conveyances, and/or persons within the limits of the United Kingdom and the islands appertaining thereto." I may mention that the words "fire," "burglary," "robbery," "theft" and "accident" are in large type. The policy then states the period of the insurance—namely, December 26, 1922, to December 25, 1923—and then has these words in large type: "Property insured," and following those words are these: "Diamonds, pearls, precious stones loose or mounted," and so on, and all other articles usually kept in stock by jewellers, "the property of Messrs. John Ellett Lake & Son, their own, in trust or on commission, or for which the assured are held to be responsible, while in their own custody, or in the custody of any person or persons to whom they may have entrusted the same on the conditions of sale or return, for valuation, or inspection, or for any other purpose whatsoever." The policy then gives the

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total amount insured as 16,000*l.* Passing over some immaterial clauses, there follow these words: "Touching the adventures and perils to the property hereby insured which we the assurers are contented to bear and do take upon us they are the loss of and/or damage or misfortune to the before mentioned property or any part thereof arising from any cause whatsoever except as hereinafter mentioned, namely:—(1.) Loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post) or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured their servants or agents unless such loss arise when the goods are deposited for safe custody by the assured their servants or agents with such broker or customer or broker's customer."

Clause 2 excepts loss, etc., from (inter alia) war, invasion, hostilities, civil war, rebellion, insurrection, military or usurped power, etc.; then follow these words: "And in case of any loss, damage or misfortune of any kind whatsoever it shall be lawful for the assured, their factors, servants, or assigns, to sue labour and travel," the usual words follow. Then come clauses which are not material. Then follow these words: "Now know ye, that we the insurers do hereby bind ourselves, each for his own part and not for one another, our heirs, executors, administrators and assigns, to make good to the said assured their executors," and so on, "all such loss or damage not exceeding the sum of 16,000*l.* in all as they may from time to time sustain by or from any of the causes hereinbefore mentioned, during the said period within seven days after such loss," and so on. Then some more clauses follow, the first of which is: "This policy covers office furniture, fixtures, fittings, plant, tools, utensils and the like, only against fire, burglary, theft and damage done thereto by burglars and thieves." Then the policy proceeds: "This insurance does not cover loss or damage directly or indirectly occasioned by, happening through, or in consequence of (*a*) invasions, hostilities, acts of foreign enemy,

riots, strikes, civil commotions, rebellions, insurrections, military or usurped power or martial law, or the burning of property by order of any public authority. (*b*) incendiarism directly or indirectly connected with any of the circumstances or causes above mentioned." Such is the policy. I have set it out somewhat fully, so that the points at issue in the case may be appreciated. Now, as to the facts.

The claim of the plaintiff arises from the dishonesty of a woman named Esme Ellison. In the early part of 1923 she was living with a Mr. van der Borgh as if his wife. Shortly before March 2, 1923, Mr. Van der Borgh occupied a well known residence at Dawlish known as Stonelands, and he and Esme Ellison lived together there. In fact the woman was a practised criminal. She had often been convicted of larceny or false pretences, and had spent substantial periods in prison. On March 2, 1923, she called at the plaintiff's shop and gave her name as Mrs. van der Borgh, and she gave her address. She told the plaintiff's manager that she was residing at Stonelands with her husband, and that her sister was engaged to marry Commander Digby of the Royal Navy. She purchased a small ring at the price of 30*l.* It was duly debited to her in the plaintiff's books as against Mrs. van der Borgh personally. About this time she had opened an account at a local bank, and she paid for the ring on March 6, 1923, by a cheque on that account. On March 6, 1923, she bought from the plaintiff a pair of old Sheffield dishes at 16*l.* 16*s.*, which were duly debited to her as before, and for which she paid later on—namely, on March 21, 1923—by a cheque on the above account. She also purchased on March 6, 1923, a diamond ring for 28*l.* 10*s.*, which was again debited against her personally as Mrs. van der Borgh, and for which she paid by cheque on April 4, 1923. Later on she purchased personally some other small articles. Upon the above facts, I hold that Mrs. Esme van der Borgh (otherwise Esme Ellison) was a "customer" of the plaintiff. This point has a direct bearing on a later question.

I turn now to the facts as to the pearl necklets. When Esme Ellison paid her visit to the plaintiff on March 6, 1923,

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she told him that her husband intended to give her as a birthday present a pearl necklet of the value of 1000*l.*, and she asked the plaintiff to procure some necklets for her inspection. The plaintiff proceeded to get some necklets from London on approval. He got some from W. Wingrove & Co. of London. He got another from H. A. Byworth & Co. of London on approval. After the plaintiff had obtained these necklets from London, Esme Ellison called on him on March 16, 1923. She told the plaintiff that she desired to choose a wedding present which her aunt, a Miss Bosanquet, intended to give to one of her sisters, and that Miss Bosanquet was then staying at Stonelands. She also selected for herself some silver goods at the price of 60*l.*, which were later delivered to her at Stonelands. The plaintiff, however, has regained possession of those silver goods. Finally, at this interview of March 16, 1923, the plaintiff showed Esme Ellison several necklets, and she indicated two of them, namely, the one with 121 pearls (Wingrove & Co.) at the price of 1100*l.* (which I will refer to as No. 121), and the one with 139 pearls (Byworth & Co.) at the price of 1000*l.* (which I will call No. 139). She asked the plaintiff to permit her to take the necklets with her to Dawlish for inspection by her husband, Mr. van der Borgh, who she said was temporarily away on business in the Ruhr. This the plaintiff allowed her to do, and she took the necklets with her. The writing in the plaintiff's sale book with respect to the pearl necklets is: "P. F. van der Borgh, Stonelands, Dawlish. (1.) A fine . . . . pearl necklet of 121 pearls 1100*l.* (2.) A fine . . . . pearl necklet of 139 pearls 1000*l.* on appro." On March 21 she paid her fourth visit to the plaintiff. She brought back the 139 pearl necklet. She then told the plaintiff (*a*) that her husband was very pleased with the 121 pearl necklet and had selected it as a present for her, and that he intended to call on the plaintiff and pay for it, but that at present he was yachting with a well known and wealthy Devonshire resident, and (*b*) that Commander Digby (who she had previously said was engaged to her sister) admired the 139 pearl necklet, but could not pay the whole

price of 1000*l.* in one sum. She left that necklet with the plaintiff. On March 28 she paid her fifth visit to the plaintiff. She said (*a*) that Commander Digby wished to buy the 139 pearl necklet, (*b*) that he was coming to Stonelands for a visit. She also said (*c*) that he desired to see the necklet on the following Tuesday, and (*d*) that she (Esme Ellison) wished to take away the necklet for the purpose of showing it to Commander Digby. It happened that the necklet was not then in the hands of the plaintiff, but he soon obtained it. On April 4, 1923, Esme Ellison paid her sixth visit to the plaintiff, and stated that April 10, 1923, would be a convenient day for her husband to pay for necklet 121, and she asked for necklet 139 for the purpose of showing it to Commander Digby. The plaintiff allowed her to take it away for that purpose. The entry in the plaintiff's sale book is: "Lt.-Commander Digby, Caddistock, Dorset. A fine . . . . pearl necklet (139 pearls) 1000*l.* on appro." The plaintiff never saw either of the necklets again, nor has he ever received any part of the price.

The conduct of Esme Ellison was fraudulent throughout. Her statements were a tissue of falsehoods. She was not, as I have already said, the wife of Mr. van der Borgh. She had no sister engaged to Commander Digby. Commander Digby was purely fictitious. She had invented him for the purpose of her crimes. She had no aunt named Miss Bosanquet. That lady also was invented. Mr. van der Borgh never intended to give her a pearl necklet in the form of a birthday or any other present. He never wished to inspect a pearl necklet. He had not been in the Ruhr, nor had he been yachting with any one. In fact Mr. van der Borgh knew nothing whatever of Esme Ellison's visits to the plaintiff with respect to the necklets in question. As soon as Esme Ellison got possession of necklet 121 on March 17 she took it to a pawnbroker in Bristol, and with his help it was sold to certain persons. As soon as she got possession of necklet 139 on April 4, 1923, she took that also to the same pawnbroker, and with his help again it was sold to certain persons. Both necklets passed either to the Continent or the United States

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into the hands of unknown people. They are admittedly irrecoverable.

On October 2, 1923, Esme Ellison was convicted at quarter sessions on her own confession of larceny of the two necklets, and she was sentenced to sixteen months' imprisonment. That conviction of course does not bind the parties as to the offence she committed : see the discussion on the point in Phipson on Evidence, 6th ed., p. 418. I may mention that by reason of s. 44, sub-ss. 3 and 4, of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), the distinction between larceny and false pretences is now often of but slight importance in the administration of the criminal law itself. It must, however, be remembered that for false pretences, as in larceny, there must be an intention to deprive the owner wholly of his property : see *Reg.* v. *Kilham.* (1)

Such are the material facts which gave rise to so much argument on the policy. I take the points in order. The plaintiff asserts that here there was larceny by Esme Ellison. The defendant asserts that the facts show false pretences only. In order to decide the point it is necessary to state the conclusions and inferences I draw from the detailed facts I have set out. My views are these : I am satisfied that Esme Ellison's conduct was fraudulent throughout ; that the small purchases in her own name were merely fraudulent devices to gain the confidence of the plaintiff ; that her return of the necklet 139 after her first receipt of it was part of her design to gain the further confidence of the plaintiff and to disarm any suspicion by him ; that at the time she obtained possession of each necklet she had the intent to steal ; that the consent of the plaintiff to her possession was obtained by a fraudulent trick ; that the only purpose for which the plaintiff gave her possession of the necklets was that she might hand the one to Mr. van der Borgh for his inspection and the other to the invented Commander Digby for his inspection ; that if those persons did not approve of and purchase them the necklets were to be returned to the plaintiff ; that Esme Ellison therefore received the necklets for a limited and specific purpose

(1) (1870) L. R. 1 C. C. 261.

only; that she had no power whatever to negotiate on the plaintiff's behalf or to transmit or pass any property in the necklets; that the plaintiff intended that his purchaser and debtor should be Mr. van der Borgh in the one case and Commander Digby in the other case. He never intended that Esme Ellison should be the purchaser or debtor.

Upon those facts and conclusions I hold that Esme Ellison was guilty of larceny by a trick with respect to each necklet. If there be not here larceny by a trick it is difficult to see how that offence can be committed. Theft in this present policy means, I assume, the same thing as larceny: see vol. iii. of Stroud's Judicial Dictionary, 2nd ed., tit. "theft"; Macgillivray on Insurance, p. 964; *Oppenheimer* v. *Frazer* (1); *Saqui & Lawrence* v. *Stearns* (2); and *Hurst* v. *Evans* (3) (Lush J.). If there be any difference in meaning then the word "theft" will have an even wider scope than "larceny." The Larceny Act, 1916, by s. 1 gives a definition of "stealing." I need not set out the section. It is printed in Archbold, 26th ed., p. 499. Suffice it to say that the section provides that the expression "takes" includes obtaining the possession by any trick. In the present case I find all the elements of larceny by a trick. The branch of criminal law which deals with larceny by a trick is dealt with in many decisions. To review them would occupy an undue space of time. It will suffice to refer to the discussion on the subject in Professor Kenny's able volume on the Criminal Law, 11th ed., pp. 205–209; and Russell on Crimes, 7th ed., vol. ii., pp. 1209, 1219. As put in Russell, p. 1210, quoting from the judgment of Fletcher Moulton L.J. in *Oppenheimer* v. *Frazer* (4): "The law recognises a form of larceny in which the apparent delivery of the possession of goods by the owner of them, which has been obtained by a trick animo furandi, does not in law import consent to that possession [by the owner], so that the person who obtained that possession may be treated as having 'taken' the goods without the owner's consent." And again on the same page, quoting from the judgment of Coleridge C.J.

(1) [1907] 2 K. B. 50, 77.
(2) [1911] 1 K. B. 426.
(3) [1917] 1 K. B. 352.
(4) [1907] 2 K. B. 50, 72.

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in *Reg.* v. *Russett* (1): "If the possession of the [money or] goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete and the parting with the possession has been obtained by fraud—that is larceny."

I have mentioned Russell on Crimes because it refers to many cases illustrating the different aspects of larceny by trick, as, for example, "ringing the changes," "the confidence trick," "ring dropping," and the like. Perhaps one of the most striking cases of larceny by a trick is *Reg.* v. *Buckmaster* (2), the "welsher" case. I need not set out the facts, though I may mention that the prosecutor admitted that he would have been satisfied, although he did not receive back the same coins. In that case, argued before the Court for Crown Cases Reserved, Manisty J. said (3): "On the authorities it is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny." It is obvious from *Reg.* v. *Buckmaster* (2) and many other decisions that much turns on the words "does not intend to pass the property." It is plain in the present case that the plaintiff did not intend to pass the property to Esme Ellison. He intended only to hand her the necklets, so that, as I said, she might hand them to others for inspection and approval by those others. As there was no Commander Digby it is obvious that he could never inspect or approve or purchase, and as Mr. van der Borgh never authorized Esme Ellison to get any necklet nor intended to purchase one, it is equally obvious that he would not have inspected, approved or purchased.

Ere passing to the four decisions expressly cited before me, I think it well to refer to Archbold's Criminal Pleadings, 26th ed., p. 517, as to larceny by a trick. The numerous decisions there cited, when taken with those in Russell on

(1) [1892] 2 Q. B. 312, 314. (2) (1887) 20 Q. B. D. 182.
(3) Ibid. 187.

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Crimes, show the difficulty if not the impossibility of giving any exhaustive or satisfactory definition of larceny by a trick. It is also well, in view of the defendant's argument here that the facts revealed false pretences only and not larceny, to refer to Archbold, p. 525. It is there well said : " The offence of larceny by a trick in some cases so nearly resembles that of obtaining by false pretences as to create some difficulty in distinguishing them upon principle. Between the crime of false pretences and that of larceny the most intelligible distinction seems to be this :—In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession ; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." The complexity of the criminal law has grown with succeeding decisions. That complexity has not perhaps been substantially lessened by a series of common law decisions on sections of an Act of Parliament which would at first sight seem remote from the criminal law. I refer (inter alia) to s. 2 of the Factors Act, 1889 (52 & 53 Vict. c. 45). That begins : " Where a mercantile agent is, with the consent of the owner," etc. Upon those words " with the consent of the owner " there have been decisions and dicta which were cited before me both for the plaintiff and the defendant. I hope that those decisions have not weakened the scope and cogency of the criminal law with respect to larceny by a trick. It is not well that there should be conflicting lines of decisions. To examine the various, and perhaps opposing, dicta would be too long a task. It might well have been held on s. 2 of the Factors Act, 1889, that, for the purpose of mercantile transactions, it mattered not that the " consent " was obtained by trick or fraud provided there was what is known to laymen as " consent." Perhaps, however, this is the true effect of *Folkes* v. *King*. (1)

I deal with the decisions briefly. First *Oppenheimer* v. *Frazer*. (2) As to this case I need only say that the dicta of

(1) [1923] 1 K. B. 282. (2) [1907] 2 K. B. 50.

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Moulton L.J. (1) seem to me to favour the conclusions I have already reached in the present case. So too of the dicta of Kennedy L.J. (2) The case turned on a point other than that before me now. Secondly *Whitehorn* v. *Davison*. (3) This decision turned to a large extent on the effect of s. 23 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). I need not read the section. In that case the distinction between larceny by a trick and the crime of false pretences was discussed. In my view, however, the facts there did not show larceny by a trick, because the wrongdoer actually received the goods under an "appro." note to himself. From the moment he received the note he could say, if he so wished, "I am the purchaser." The words of Buckley L.J. (4) also favour the plaintiff here. Upon those words Bray J. said in *Mehta* v. *Sutton* (5) that Buckley L.J. meant "that if the owner did not intend to pass the property, nor to confer a power to pass the property it would be larceny by a trick." The observations of Bray J., just cited, lead me to the third decision: *Folkes* v. *King*. (6) There the owner of a motor car delivered it to a mercantile agent for sale with the stipulation only that the agent should not, without the owner's permission, sell at less than a specified price. The agent intended from the beginning to sell the car at once for what he could get for it and to appropriate the proceeds to his own use. He sold it the very day he received the car, and kept the proceeds. It was held he could not be convicted of larceny by a trick, because he was authorized by the plaintiff to pass the property to a purchaser. The facts I have stated give the explanation of the case. As Bankes L.J. put it (7): "The first question in the present case, therefore, resolves itself into the question whether under the circumstances the plaintiff did intend to pass the property in the car to Hudson or to give him the necessary authority to pass the property in it to a purchaser." It seems to follow from this decision, which binds me, that

(1) [1907] 2 K. B. 71, 72, 73.
(2) Ibid. 77.
(3) [1911] 1 K. B. 463.
(4) Ibid. 479.
(5) (1913) 29 Times L. R. 185, 187, 188.
(6) [1923] 1 K. B. 282.
(7) [1923] 1 K. B. 293.

there is not larceny by a trick (although an indictment may lie for false pretences) where the prosecutor intends either to pass his property to the alleged wrongdoer, or to give him the necessary authority to pass that property to a purchaser. In my view, however, as I have already said, the plaintiff now before me did not intend to pass the property in the necklets to Esme Ellison or to give her any authority to pass the property in them to a purchaser. I find nothing in *Folkes* v. *King* (1) adverse to the present plaintiff.

The last case I need cite on this point is *Heap* v. *Motorists' Advisory Agency, Ld.* (2), decided by Lush J., who until quite recently was a most able and distinguished colleague of the judges of the King's Bench Division. There the plaintiff, the owner of a motor car, wishing to sell it for 210*l.*, was told by one North that he had a friend (Hargreaves) who would probably purchase it for that price. So the plaintiff allowed North to have possession. But North was dishonest. There was no such person as Hargreaves, and North at once sold the car and pocketed the proceeds for himself. It was held by Lush J. that there was larceny by a trick, inasmuch as the plaintiff had only allowed North to have possession of the car for the purpose of showing it and endeavouring to sell it to the alleged Hargreaves. The keynote, perhaps, of that decision is given in the judgment, where Lush J. says (3): "In the present case in my view of the facts the plaintiff never did intend either that North should himself have the property in the car, or that he should pass the property in it to any real person as would have been the case if he had instructed North to find a purchaser for the car. What he did intend was that North should have possession of the car in order to take it and show it to a person who in fact had no existence—namely, the alleged Hargreaves." That view of Lush J. seems to be fully agreeable to the words of Buckley L.J. in *Whitehorn* v. *Davison* (4); of Scrutton L.J. in *Folkes* v. *King* (5); and to the cases of *Hardman* v. *Booth* (6) and *Cundy* v. *Lindsay*. (7)

(1) [1923] 1 K. B. 282.
(2) [1923] 1 K. B. 577.
(3) Ibid. 585.
(4) [1911] 1 K. B. 479.
(5) [1923] 1 K. B. 305.
(6) (1863) 1 H. & C. 803.
(7) (1878) 3 App. Cas. 459.

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Heap's case (1) would, of course, cover the facts as to the Commander Digby necklet in the present case, inasmuch as that alleged commander was non-existent. But it is not necessary to invoke here the decision of Lush J., inasmuch as Esme Ellison had no power, as I have said, as to either necklet to take the property to herself or to transfer it to any third person. She was a mere conveyor of the necklets for the purpose of handing them to others for inspection. In no sense whatever was she an agent with a power of sale. In substance the plaintiff never said to her "Sell the necklets for me." All he said was: "Carry the necklets to possible customers for inspection by them." I therefore hold that there was larceny by a trick in respect of both necklets.

My decision on the first main point (that is as to theft) renders it unnecessary to give an actual decision on the further and serious contention of the plaintiff—namely, that the policy was not confined to fire, burglary, robbery, accident, or theft. This contention may well call for serious consideration in some other case. The word "accident" followed by the words, "from whatsoever cause or misadventure," are indeed broad. Later on in the policy there appear the words, "loss of and/or damage or misfortune to the before mentioned property or any part thereof arising from any cause whatsoever," and there are additional words of equal breadth. As the plaintiff's counsel pointed out, the very width of the exceptions may imply a preceding breadth of contractual area. The contra proferentem doctrine moreover may require attention: see, for example, Macgillivray on Insurance, p. 853; and *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (2) The question as to the width of obligation in a policy worded as this one is may arise in some future litigation. The looseness and amplitude of the clauses can then be considered.

I now turn to the third main point argued before me—namely, as to the area of goods covered by the policy. The material words on the point are: "Diamonds, etc. . . . . the property of Messrs. John Ellett Lake & Son, their

(1) [1923] 1 K. B. 577. (2) [1909] 1 K. B. 591.

own, in trust or on commission, or for which the assured are held to be responsible, while in their own custody," and so on.

Mr. Jowitt K.C. for the plaintiff took two points. First, he said that the plaintiff had the two necklets in trust, and alternatively, that they were necklets for which the plaintiff was responsible. It is not my function to criticize the wording of the policy, but only to construe it. First then, were these necklets "in trust"? The phrase may appear to be ambiguous until the decisions are looked at. In my view, the words "in trust" have now received a settled interpretation. That interpretation is shown by two decisions. In *Waters* v. *Monarch Fire and Life Assurance Co.* (1) warehousemen insured goods in their possession belonging to third persons. The words in the policy were, "in trust or on commission." The goods were destroyed by fire. It was held that the warehousemen could recover upon the words "in trust," although they were not liable (there being no negligence on their part) to make good the loss to the owners of the goods. Lord Campbell said (2): "What is meant . . . . by the words, 'goods in trust'? I think that means goods with which the assured were entrusted; not goods held in trust in the strict technical sense." A like decision was given in the case of *London and North Western Ry. Co.* v. *Glyn.* (3)

Upon those decisions I hold that here the plaintiff held the two necklets "in trust," within the meaning of those words in the policy before me. The qualifying words in later decisions, for example, in the *North British Case* (4), do not appear in the present policy, and it was such qualifying words as "for which assured is responsible" which appeared in the policy considered by Roche J. in *Engel* v. *Lancashire and General Assurance Co.* (5)

Then was the plaintiff "responsible" for the necklets? It is to be noted that the words of the policy here are "in trust or on commission, or for which the assured are held to

(1) (1856) 5 E. & B. 870.
(2) Ibid. 880.
(3) (1859) 1 E. & E. 652.
(4) (1877) 5 Ch. D. 569.
(5) (1925) 30 Com. Cas. 202.

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be responsible." The disjunctive " or " is important. In my view, the plaintiff was " responsible " for the necklets to the respective owners, Messrs. Wingrove & Co., Ld., and Messrs. Byworth & Co. The terms of the " appro. " notes under which the plaintiff obtained the necklets are these. The appro. note of Messrs. Wingrove & Co. said " on appro." " The goods specified below are sent by Wingrove & Co., Ld., on approbation, and being covered by insurance whilst in transit, they remain the property of Wingrove & Co., Ld., and are to be returned in good condition and on request." The appro. note of Messrs. Byworth & Co. said " on appro." " These goods remain the property of H. H. Byworth & Co. until invoiced by them. You in the meantime responsible for loss or damage." For the purposes of the present case I see no substantial distinction between the two notes. To determine whether the plaintiff was " responsible " I think that I must consider (inter alia) s. 18 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), r. 4. I need not set out that rule with respect to goods sold " on sale or return," i.e., on appro. Where there are appro. notes such as the present (and certainly in the case of the appro. note of Byworth & Co.) the owner appears to expressly reserve his right to pass the property: see *Kempler* v. *Bravingtons, Ld.* (1), in the Court of Appeal. I do not propose to discuss the many decisions on s. 18 of the Sale of Goods Act, 1893. If goods are delivered to a man on " sale or return " prima facie he must return the goods or become liable for the price. If there be a fixed period for the return, that period must be observed. If there be no fixed period, the law itself fixes a reasonable time. In the present case I am of opinion that the wording of the appro. notes threw upon the plaintiff the responsibility of actually returning the goods or of becoming liable for the price. Here, he could not return the goods, and thus he became, I think, liable to Messrs. Wingrove & Co., Ld., and to Messrs. Byworth & Co. The plaintiff has in fact paid those firms for the necklets. He had given, I may say, no notice of rejection. It may be too that upon the principle of *Genn* v. *Winkel* (2),

(1) (1925) 133 L. T. 680. (2) (1912) 107 L. T. 434.

in the Court of Appeal, the plaintiff, by handing the necklets to Esme Ellison under the special circumstances of the present case, must be treated as having caused the loss of them by his own default, and, therefore, must be treated as having adopted the transaction within s. 18. In *Ray* v. *Barker* (1) the Court of Appeal seemed to be somewhat strongly of the opinion that the person who received the goods "upon sale or return" would be liable if he was unable to return the goods through the fraudulent act of a third person to whom he had delivered them. The facts there are strikingly like the facts now before me. There is a useful discussion on cognate points in Benjamin on Sale, 6th ed., pp. 369–374. The principle of such decisions as *Humphries* v. *Carvalho* (2) and *Moss* v. *Sweet* (3) is not irrelevant. The case of *Elphick* v. *Barnes* (4) is to be distinguished. There the buyer of a horse on sale or return had eight days in which to return it, and it died within the period without his default. The defendant was held not liable by Denman J. But there the subject matter perished entirely. In the case now before me the necklets did not perish; they merely passed to other hands. It follows from what I have already said in this judgment that the defendant is liable, unless he is saved by some exception in the policy.

I therefore pass to the final main point. It arose upon one of the exceptions in the policy. I set out the words again. They are these: "Loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured (except when conveying goods to the post) or by any customer or broker or broker's customer in respect of goods entrusted to them by the assured their servants or agents unless such loss arise when the goods are deposited for safe custody by the assured their servants or agents with such broker or customer or broker's customer." A like exception was mentioned, but not discussed, by the House of Lords in *Moore* v. *Evans*. (5)

(1) (1879) 4 Ex. D. 279.
(2) (1812) 16 East, 45.
(3) (1851) 16 Q. B. 493.
(4) (1880) 5 C. P. D. 321.
(5) (1917) 117 L. T. 761.

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The able argument for the defendant may be put in a few words as follows. If there was a loss by theft, then (*a*) Esme Ellison was a customer, (*b*) the necklets were entrusted to her, (*c*) she stole them, and (*d*) hence the exception applies to save the defendant from liability. But the matter is not, I think, so simple as that. The exception contemplates (inter alia) (*a*) that a theft by a messenger not in the exclusive employ of the assured may not fall within the exception, and (*b*) that goods received by a customer for safe custody and then stolen will not fall within the exception. The exception as a whole is obscure, and the word "entrust" is ambiguous in view of the context. Did the parties intend that such a set of facts as those in the present case should fall within the exception? To illustrate the doctrine of alio intuitu I need only refer to three decisions—namely, that of A. L. Smith L.J. in *Bates* v. *Donaldson* (1); *Barnett* v. *Javeri & Co.* (2), per Bailhache J.; and *Radcliffe & Co.* v. *Compagnie Generale Transatlantique* (3), per Bankes L.J.

In my view the exception here, so far as relevant, was meant to apply to a case where jewellery was delivered to a customer qua customer, and for the purposes of that customer as such, with respect, for example, to the purchase by that customer of goods delivered on sale or return to him or her. A customer may be a customer with respect to one transaction and a mere agent, or messenger, or carrier with respect to another proposed transaction. In the present case I hold that the necklets were not entrusted to Esme Ellison as a customer within the meaning of the exception. She received them as a mere agent or messenger for the purpose of showing them to others who might or might not become customers. I therefore hold that the exception here does not apply. I may add that in any event the exception is most doubtful in meaning. Unless it be clear in its effect the defendant cannot rely upon it. It suffices to refer to the words of Lord Macnaghten in *Elderslie Steamship Co.* v. *Borthwick* (4), when he said: "An ambiguous document is no

(1) [1896] 2 Q. B. 241, 247.
(2) [1916] 2 K. B. 390.
(3) (1918) 24 Com. Cas. 40, 44.
(4) [1905] A. C. 93, 96.

protection"; to *Nelson Line, Ld.* v. *James Nelson & Sons, Ld.* (1); and to *Wallis & Co.* v. *Pratt & Co.* (2)

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In spite, therefore, of the able argument of Mr. Bevan K.C. and Mr. van den Berg, I think that the defence fails, and for the reasons given, there must be judgment for the plaintiff for 1450*l.* with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Kenneth Brown, Baker, Baker, for Dunn & Baker, Exeter.*

Solicitors for defendants: *Windybank, Samuell & Lawrence.*

W. L. L. B.

DAVENTRY CORPORATION *v.* NEWBURY AND WRIGHT.

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Dec. 16, 18.

Local Government—Fire Brigade—Services by Brigade outside Borough—Services rendered at Request of Tenant of Premises—Liability of Tenant to pay for Services—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 32, 33.

Sect. 33 of the Town Police Clauses Act, 1847, which enables a local authority to send their fire brigade beyond the limits of their district for the purpose of extinguishing a fire, and imposes upon the owner of the lands or buildings where the fire occurs the liability for the expense so incurred, is an enabling, and not a restricting, section. It does not preclude the local authority making a contract with some one other than the owner of the premises for the services of the fire brigade outside their district.

Sect. 33 is intended to deal with cases where the local authority, on their own initiative, send their fire brigade outside their district for the purpose of extinguishing a fire, or where the fire brigade is sent in response to a summons in circumstances in which no contract with the person summoning it can be inferred.

APPEAL from Daventry County Court.

The plaintiffs, the Daventry Corporation, claimed 12*l.* 5*s.* for services rendered by their fire brigade to the defendants at the latters' request on the occasion of a fire in October, 1924, at the farm of which the defendants were tenants, and of which Sir Charles Knightley was the owner. The farm

(1) [1908] A. C. 16. (2) [1911] A. C. 394.

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was five miles outside the limits of the borough of Daventry. The request to render the services in question was not disputed, but it was said that by virtue of ss. 32 and 33 of the Town Police Clauses Act, 1847 (1), the defendants were not liable.

The county court judge held that s. 33 of the Town Police Clauses Act, 1847, did not apply, and that the plaintiffs were entitled to recover from the defendants the amount claimed, and he gave judgment accordingly.

The defendants appealed.

Cave K.C. and *Parsey* for the defendants. Sect. 33 of the Town Police Clauses Act, 1847, only enables a local authority to send its fire brigade and firemen beyond the limits of the borough on the terms therein specified. It provides specifically that in such circumstances the owner of the land or buildings where the fire occurs is the person who is to pay for the services rendered by the fire brigade, the only person, in many cases, who is able to pay. In this case the defendants, although they owned the stacks which were burnt down, are tenants only of the land, and therefore no liability attaches to them. The liability is that of the owner, who is defined by s. 4 of the Public Health Act, 1875 (with which Act the provisions of the Town Police Clauses Act, 1847, with respect to fires, are incorporated), as "the person for the time being receiving the

(1) Town Police Clauses Act, 1847, s. 32, enables local authorities to purchase or provide fire engines and appurtenances.

Sect. 33: "The [local authority] may send such engines, with their appurtenances, and the said firemen, beyond the limits of the special Act, for extinguishing fire in the neighbourhood of the said limits; and the owner of the lands or buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the [local authority] a reasonable charge for the use of such engines with their appurtenances, and for the attendance of such firemen; and in case of any difference between the [local authority] and the owner of the said lands or buildings, the amount of the said expenses and charge, as well as the propriety of sending the said engines and firemen as aforesaid for extinguishing such fire (if the propriety thereof be disputed), shall be determined by two justices, whose decision shall be final; and the amount of the said expenses and charge shall be recovered by the [local authority] as damages."

rack rent of the lands or premises." In *Lewis* v. *Arnold* (1) it was held that the occupier of land might be the "owner" for this purpose, but that case was overruled by *Sale* v. *Phillips* (2), on the ground that it "was decided under a misapprehension. The learned judges were not informed that an incorporated statute contained a definition of 'owner' which made the landlord liable."

Maurice FitzGerald for the plaintiffs. The defendants requested the services of the plaintiffs' fire brigade, and that request involves an agreement by the defendants to pay. That was decided in *James* v. *Staines Urban Council* (3), where the local authority provided the fire brigade under the Lighting and Watching Act, 1834. Sect. 33 of the Act of 1847, upon which reliance is placed for the defendants, is an enabling, and not a restricting section. It is intended to meet cases where the local authority, on their own initiative, send the fire brigade beyond the limits of their district; it does not affect any common law right of the plaintiffs to make a contract for the services of their fire brigade being given for reward.

Cave K.C. in reply. The effect of s. 33 of the Town Police Clauses Act, 1847, did not come in question in *James* v. *Staines Urban Council* (4), and that decision has no bearing upon the present district. Sect. 33 was intended to exclude the operation of the common law rule. It is to be noted that s. 30 of the Metropolitan Fire Brigade Act, 1865, places the liability in such a case on the "owner and occupier" jointly and severally, whereas s. 33 of the Act of 1847 places the liability on the owner alone.

SANKEY J. stated the facts and continued: The questions involved in this appeal are whether the plaintiffs have the right to send their fire brigade outside their own district, as they in fact did, and whether, having done so, and thereby incurred expenses, they are entitled to recover those expenses from the defendants. It is not denied that the defendants

(1) (1875) L. R. 10 Q. B. 245.
(2) [1894] 1 Q. B. 349, 350.
(3) (1900) 83 L. T. 426.
(4) 83 L. T. 426.

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requested the plaintiffs to send their fire brigade to the farm where the fire occurred, that the plaintiffs did so in compliance with that request, and that if there were no statute governing the matter, the plaintiffs would be entitled to recover the expenses incurred by them from the defendants. Counsel for the defendants, however, contend that this matter does not depend upon the common law, but upon a statute which in the circumstances of this case imposes the liability upon the owner of the land, Sir Charles Knightley. The statute relied upon is the Town Police Clauses Act, 1847, which by s. 32 empowers the local authority to purchase or provide fire engines and appurtenances, and by s. 33 empowers them to send their fire engines beyond the limits of the special Act for extinguishing fires in the neighbourhood of the said limits, and then the section provides that "the owner of the lands or buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the [local authority] a reasonable charge for the use of such engines with their appurtenances, and for the attendance of such firemen," and any dispute as to the expenses and charges or as to the propriety of sending the engines and firemen is to be determined by two justices. Without that section, it is said, the plaintiffs could not have sent their fire engine outside their district to the defendants' farm; the section allowed them to do so, but provided who should bear the cost of so doing—namely, the owner of the land.

In *James* v. *Staines Urban Council* (1), where s. 32 did, but s. 33 did not, come in question, the facts were that a fire having broken out in Staines with which the Staines fire brigade was not able to cope, the Egham fire brigade was called to assist in extinguishing the fire, and did so. It was decided that the Egham local authority were entitled to recover from the Staines local authority reasonable remuneration for so doing. Mr. Cave does not challenge the propriety of that decision, but says that in this case we must have regard only to s. 33. Mr. FitzGerald, on the other

(1) 83 L. T. 426.

hand, says that s. 33 is an enabling, and not a restricting, section, and that it was designed to meet the case where a local authority, on their own initiative, send the fire brigade to a fire at some place outside their district which, if not extinguished promptly, might spread into their district. In such a case there would be no request by any one for the fire brigade to be sent; and in those circumstances the section says who is to pay the expenses incurred by the local authority—namely, the owner of the land or buildings, subject to the local authority satisfying two justices, in case of dispute, of the propriety of sending the fire brigade and of the reasonableness of the expenses claimed. The local authority could not, for instance, put the liability upon the owner if the attendance of the fire brigade was obviously unnecessary. Mr. Cave directed our attention to the fact that in the Metropolitan Fire Brigade Act, 1865, the owner and occupier of the property where the fire has occurred are made jointly and severally liable to defray the expenses of the fire brigade in such a case. I do not think, however, that the fact that in that statute the liability is cast upon the occupier as well as upon the owner affects the construction we ought to put upon s. 33 of the Act of 1847. In my opinion that is an enabling section, and a very useful section in the public interest. I think its true construction is as contended by counsel for the plaintiffs, and that it does not preclude a local authority from making a proper and valid contract to send their fire engine outside their district at the request of some one, not the owner of the land or buildings. If they do so, they have a common law right to recover from the person so requesting them the expense they have incurred. There is nothing in the section which impliedly compels us to hold the contrary. The county court judge came to a right decision, and the appeal must be dismissed.

SALTER J. I am of the same opinion. It is admitted that there was a request for the services of the fire engine given in circumstances from which, apart from any statutory provision, a promise to make payment would be implied.

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Then comes the question whether, putting on one side for the moment s. 33, the plaintiffs had the power to send the fire engine outside their district, and whether they had power to make such a contract as in fact they made. In *James* v. *Staines Urban Council* (1), the Egham local authority had a fire engine under the provisions of the Lighting and Watching Act, 1834, which contained a section practically identical, for the present purpose, with s. 32 of the Town Police Clauses Act, 1847. They sent their fire engine to help to extinguish a fire at Staines, and they did so in response to a request from Staines, from which in the ordinary course a promise to pay would be implied. While the point was not raised in that case, the Court certainly assumed that the Egham local authority had the power to send the fire engine outside their district and the power to make a contract for payment for its services. In my opinion the present plaintiffs had power to send their fire engine outside their district and had power to make the contract they made, but in any view I do not think it is open to the defendants, who availed themselves of the services of the fire engine, to contend the contrary. This is apart from s. 33, and the only real point argued is the meaning and effect of that section. Its object and effect are fairly plain. A fire engine is summoned by all sorts of people, often in circumstances in which no contract can be assumed with the person summoning it. Then, again, the local authority themselves may become aware of a fire and send their fire engine to deal with it. Sect. 33 is intended to deal with cases of that kind and also with cases of fire occurring outside, but near enough to the town, to make it expedient for the safety of the town that the town fire engine should assist in extinguishing it. The Town Police Clauses Act, 1847, deals with the safety and good order of towns. Sect. 33 is not necessary to enable the plaintiffs to send their fire engine outside their district, but it is necessary to enable them to charge the owner in such a case. If the fire is in the neighbourhood of the town and the local authority can satisfy the justices of the

(1) 83 L. T. 426.

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propriety of sending the fire engine and of the reasonableness of their charges, they can claim these from the owner. Sect. 33 is an enabling section, and does not prevent them from sending their fire engine outside their district and from doing so for reward. I express no opinion upon the point whether the plaintiffs could have recovered this money from Sir Charles Knightley, assuming they could satisfy the justices under the latter part of the section, but I agree that they are entitled to recover the amount from the defendants at common law on the contract made with them.

Appeal dismissed.

Solicitors for plaintiffs: *Vizard, Oldham, Crowder & Cash, for G. E. Foster, Town Clerk, Daventry.*

Solicitors for defendants: *Nash, Field & Co., for Reynolds & Co., Birmingham.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.

1924 *Nov.* 21, 24.

1925 *Dec.* 15.

INLAND REVENUE COMMISSIONERS *v.* BLACKWELL.

Revenue—Income Tax—Super Tax—Devise of real Estate to Trustees for eldest Son upon attaining Twenty-one—Power to apply Income for Maintenance—Direction to accumulate surplus Income—Liability to Super Tax in respect of Accumulations—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

Since the appeal in this case was opened an originating summons had, by the direction of the Court, been taken out to determine on the construction of the will what interest the infant took in the specifically devised real estate. The summons came before Tomlin J., who held that he took only an interest contingently on his attaining twenty-one years: see *In re Blackwell* [1925] Ch. 312; and this decision was subsequently affirmed by the Court of Appeal ([1926] 1 Ch. 223). The effect of this decision was to reduce the total income of the infant during the year of assessment to 1107*l.*, which was below the super tax limit. In these circumstances the present appeal from Rowlatt J. was therefore abandoned, but in dismissing the appeal the Court expressly abstained from expressing any opinion on the accuracy of the decision of Rowlatt J. on the point decided by him.

APPEAL from a decision of Rowlatt J. (1) on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

(1) [1924] 2 K. B. 351.

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The testator by his will devised certain real estate to trustees upon trust for the eldest of his sons who should be living at the time of his death absolutely upon his attaining the age of twenty-one years, and failing such son he directed the same to fall into and be held upon the same trusts as were declared concerning his residuary estate. He gave the residue of his property, both real and personal, to his trustees, subject to certain payments to his wife, upon trust for all his children in equal shares, which were to be interests absolutely vested on his death. He empowered the trustees to apply the whole or such part as they thought fit of the income of the property or share to which any infant should be entitled or contingently entitled towards his or her maintenance, education or benefit, and he directed the trustees to accumulate the unapplied surplus income, such accumulation to be added as capital to the property or share whence the same should have arisen.

The testator at his death left four children, a son and three daughters, all of whom were infants. The trustees made certain payments to the testator's widow in accordance with the terms of the will and accumulated the surplus income arising from the real estate devised in trust for the eldest son and from the one-fourth share of the residuary estate to which such son was entitled.

Rowlatt J. held that, inasmuch as there was a trust in the testator's will to accumulate the income subject to a power to the trustees to apply such sums as they thought proper for the maintenance of the testator's children, the portion of the income which was accumulated was not the income of the infant eldest son, such accumulations coming to him not as income but as capital, and were therefore not liable to assessment to super tax.

The Crown appealed.

The appeal was opened on Nov. 21 and 24, 1924.

Sir Patrick Hastings K.C., *J. E. Harman* and *R. P. Hills* for the Crown.

Cunliffe K.C., *Latter K.C.* and *S. G. Turner* for the respondent.

At the conclusion of the opening for the Crown the Court (Pollock M.R., Warrington and Scrutton L.JJ.) ordered the appeal to stand over till the following Hilary Term, and that in the meantime an originating summons should be taken out to determine the construction of the will. This was accordingly done, and the summons came before Tomlin J., who held that the son became on the testator's death entitled to the real estate contingently on his attaining the age of twenty-one years, and also took a like interest in the accumulations. On appeal Tomlin J.'s decision was affirmed by the Court of Appeal: see *In re Blackwell.* (1)

Dec. 15. The appeal, having been restored to the list, now came on for further argument.

R. P. Hills (*Sir Douglas Hogg A.-G.* and *Sir Thomas Inskip S.-G.* with him) for the Crown.

Cunliffe K.C., *Latter K.C.* and *S. G. Turner* for the respondent.

R. P. Hills now stated that the facts were different from what they were when the case was last before the Court of Appeal. It now appeared from the supplemental case stated that the total income of the son was 1107*l.*, which was below the super tax limit. It was useless therefore to proceed with the appeal.

The Court (Pollock M.R., Warrington and Sargant L.JJ.) accordingly dismissed the appeal.

POLLOCK M.R. in dismissing the appeal said: Perhaps it is right that I should explain exactly how this appeal comes to be dismissed. I have already said in the previous case (2) which was argued before us, that when this appeal came before us, as it did on November 24, 1924, it became clear to us that one point was raised, and that was whether or not the interests of the minor were vested or contingent, and it was important

(1) [1925] Ch. 312; on appeal [1926] 1 Ch. 223.
(2) *In re Blackwell* [1926] 1 Ch. 223.

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to have that matter determined. We accordingly decided to adjourn the appeal in order that the parties might have the opportunity of obtaining a decision of one of the learned judges of the Court upon this question, and the parties undertook to give all facilities to secure a decision. More than that, if I recollect rightly, inasmuch as the rights of the Crown might be affected, we pointed out that it was not to be a precedent, but that it might be, in the circumstances of this case, proper to let the Attorney-General know, lest he should think that the rights of the Crown were affected and desire to be represented before the learned judge who decided on the interpretation of the will.

The parties took steps to secure a decision on the interpretation of the will, and Tomlin J. gave his decision on February 4, 1925, and we have affirmed it to-day. He has held that the minor took a contingent and not a vested interest. The effect of that decision on the figures is this, that from a supplementary case that has been put in we find that the income of the minor in the year of charge was 1107*l.* and no more, which is below the super tax limit. The result is that apart from any question of interpretation, the minor would not be liable to pay super tax. In those circumstances it is useless to proceed further with the appeal. The appeal therefore fails, and must be dismissed with costs.

We have not determined the question that the Attorney-General and Mr. Hills desired to argue, namely, whether or not Rowlatt J. was right in the decision to which he came. We have decided the case upon the point which was argued or taken before Rowlatt J., but to which he apparently attached less importance than he did to the other point, that is to say, the question whether the interest of the infant was vested or contingent. Now our determination of the appeal rests upon the fact that the interest of the infant is contingent and not vested. It is unnecessary for us to deal and we have not therefore dealt with what we are told is or was intended to be the main subject of the appeal—namely, the question whether or not Rowlatt J.'s decision as reported (1)

(1) [1924] 2 K. B. 351.

is correct. That matter must stand over until the same point arises upon a properly constituted appeal, when the Court will have to determine it.

Appeal dismissed.

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Solicitor for Crown : *Solicitor of Inland Revenue.*
Solicitors for respondents : *Charles Stevens & Drayton.*

W. I. C.

FALCON *v.* THE FAMOUS PLAYERS FILM COMPANY, LIMITED, AND OTHERS.

1925 *Oct.* 26, 27, 28 ; *Nov.* 13.

[1923. F. 907.]

Copyright—Dramatic Work—Foreign Author—Place of First Performance —Performing Rights—Accrual of before Copyright Act, 1911*—Continuance thereafter—Inclusion in of Cinematograph Rights—Infringement—By Person performing Work without Consent—By Person directing, counselling, or aiding—Unauthorized Manufacture and Exhibition of Film—Injunction—Delivery up of Film and Copies—Copyright Act,* 1911 (1 *& 2 Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1 (*a*), 2, 3 ; *s.* 2, *sub-ss.* 1, 2, 3 ; *s.* 8 ; *s.* 24 ; *s.* 35 ; *First Schedule.*

Under the Dramatic Copyright Act, 1833, the author of a dramatic work, though of foreign nationality and resident outside British territory, could secure the dramatic copyright in the work within the British Empire if the first performance of the work was given in this country.

The repeal of the Dramatic Copyright Act, 1833, by the Copyright Act, 1911, did not destroy any right accrued under that earlier Act, and a person who was entitled under the earlier Act to the performing rights in a dramatic work obtained by s. 24 of the later Act the substituted right set out in the First Schedule to that Act—namely. " the sole right to perform the work in public."

A person who, before the Copyright Act, 1911, had the performing rights in a dramatic work does not lose these rights because, by reason of s. 1, sub-s. 3, of the Act, the first performance in this country was not a publication of the work within the contemplation of s. 1, sub-s. 1 (*a*).

A person who possesses the sole right to perform a dramatic work in public under the Copyright Act, 1911, possesses the cinema or film rights thereof in this country.

On the true construction of the provisions of the Copyright Act, 1911, copyright in a dramatic work is infringed not only by a person who without the consent of the owner actually performs the work in public, but also by a person who directs, counsels, or aids another in so performing the work.

In 1885 a citizen of a foreign state resident therein wrote a dramatic

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work, the first performance of which took place in 1886 in the United Kingdom. In 1898 the author sold to the plaintiff the performing rights in the work for the United Kingdom. In September, 1919, by an agreement between the author and a foreign corporation, the former purported to grant to the latter all the motion picture rights in the work throughout the world, and that corporation through two companies as intermediaries let out the film to (among others) the proprietor of a picture theatre in the United Kingdom, who gave a film representation of the work there. In an action by the plaintiff against the two companies, the corporation, and the proprietor of the theatre for an injunction to restrain them from infringing the plaintiff's rights, and for other relief:—

Held, that the plaintiff was entitled to judgment against all the defendants for the relief which he claimed; the fourth defendant having actually infringed the plaintiff's rights, and the other three defendants having in the circumstances directed, counselled or aided him in so doing.

Evidence—Letter to Plaintiff from Person having Interest in Success of Defendant—Admissibility against Defendant—Admission against Interest of Writer—Admission by Predecessor in Title—Public Document—Register of dramatic Copyright—Entry in—Certified Copy—Proof of Title—Admissibility—Error in Entry.

A letter to the plaintiff in an action from a person not named in the record but having a substantial interest in the success of the defendant admitted in evidence against the defendant as being an admission against the interest of the writer, and also as being an admission by the defendant's predecessor in title.

The register of dramatic copyright kept at Stationers' Hall is a public register, and an entry therein or a certified copy of the entry is admissible as evidence in support of a person's title to a dramatic work. While an error in the entry may preclude a party from relying upon the entry or certified copy thereof as prima facie evidence of his title, it does not render the entry or copy inadmissible as corroborative of other evidence of his title.

ACTION tried by McCardie J. without a jury.

The following statement of facts is taken substantially from the judgment of McCardie J.

In 1885 a Mr. William Gillette, a well known actor and dramatic author in the United States, wrote a play called "Held by the Enemy," which was based on the American civil war and contained much vivid incident and dialogue. In 1898 and onward till 1916 Mr. Charles Frohman and his colleague Mr. W. Lestocq acted as the agents in the United Kingdom of Mr. Gillette. In 1898 negotiations took place between them, acting for Mr. Gillette, and Mr. Falcon, the

plaintiff, for the acquisition by the latter of the performing rights in "Held by the Enemy" for Great Britain and Ireland. Mr. Gillette himself also saw the plaintiff, and personally and actively engaged in the negotiations. As a result a written agreement dated June 30, 1898, was entered into between Mr. Gillette and the plaintiff, and signed by both parties. It expressly recited that Mr. Gillette was the "author and the sole proprietor of the right of performing the play entitled 'Held by the Enemy.'" The agreement then provided that for the sum of 150*l.* Mr. Gillette granted to the plaintiff "the sole and exclusive right to perform or have performed the said play entitled 'Held by the Enemy' in Great Britain and Ireland." There was one small reservation only—namely, a right for Mr. Gillette to perform without payment the play at a London, West End, theatre, provided he played in the piece himself. On June 30, 1898, Mr. Lestocq, as agent for Mr. Gillette, wrote to the plaintiff: "You now have the rights for Great Britain and Ireland." On September 22, 1898, Mr. Lestocq, on behalf of Mr. Gillette, wrote to the plaintiff: "Dear Mr. Falcon, I have this morning heard from Mr. Gillette and he informs me that 'Held by the Enemy' was played in this country at Ladbroke Hall, Notting Hill, on Saturday, February 20th, 1886, and performed in America on Monday, February 22nd, 1886, therefore, you will see that the copyright is clear. Yours very truly, W. Lestocq." From 1898 onward, the plaintiff, pursuant to his rights under the agreement of June 30, 1898, gave or licensed performances in this country of "Held by the Enemy," and his rights were unchallenged by any one. In 1910 the plaintiff gave a licence to a certain dramatic body to perform the play. Thereupon Mr. Frohman and Mr. Lestocq, who had apparently forgotten the agreement of June 30, 1898, questioned the rights of the plaintiff. The plaintiff at once issued a writ against these two gentlemen claiming damages for slander of title and other relief. A statement of claim was delivered. As a result of that action an order was made by Horridge J. on February 17, 1911, by which it was expressly declared that the plaintiff was the only person entitled to grant licences

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for the performance of the play in Great Britain and Ireland, and an injunction was granted against both defendants, and the plaintiff recovered damages and costs. From 1910 onwards the plaintiff continued to exercise without disturbance his right as owner of the copyright.

On July 1, 1912, the Copyright Act, 1911, came into force, and the plaintiff claimed that under that Act he became possessed of the cinematograph rights as well as the ordinary theatrical performing rights of "Held by the Enemy."

On September 6, 1919, an agreement was made between Mr. Gillette and the Famous Players Lasky Corporation, a body corporate of the United States engaged in the manufacture of films. The agreement first recited that "Whereas the owner (Mr. Gillette) represents that he is the sole owner of the motion picture rights throughout the world in and to a certain original play entitled 'Held by the Enemy,' written by the said Wm. Gillette." It then contained a purported grant by Mr. Gillette to the corporation of "all the motion picture rights" in "Held by the Enemy" throughout the world; and it also contained an express warranty by Mr. Gillette that he was the sole owner of the said motion picture rights throughout the world and that he had full right and authority to grant the said rights to the purchasers. The sum paid by the corporation to Mr. Gillette was 4000*l*. Acting under that agreement the corporation made in the United States the film of "Held by the Enemy." They then sent over to the Famous Players Film Co., Ld., who were an English company, the negative and two positives of the film. That company then made further copies of the film and handed them to the Famous Lasky Film Service, Ld., also an English company, for the purpose of being let out in the United Kingdom. The latter company then let out the film to a Mr. Robert Chetham, the proprietor of a picture theatre at Bedford, for actual exhibition on the terms that he should pay a share of the receipts to them. The said corporation and the said two companies were interlinked and interworking organizations, and their operative relations inter se were shown by several complex agreements.

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In the early part of 1922 the plaintiff learned that Mr. Chetham was giving a cinematograph performance of the play at his picture theatre in Bedford. Much correspondence took place between Mr. Gillette and Mr. Chetham relating to the matter. It was not disputed that the film performance in substance represented the play "Held by the Enemy." A substantial share of receipts from the said actual exhibition of the said film passed to the second of the above mentioned companies, then to the first of these companies, and then to the said corporation.

On May 17, 1923, the plaintiff brought the present action against the Famous Players Film Co., Ld., hereinafter called the first defendants, claiming an injunction to restrain them from infringing the copyright of the said play. On February 12, 1925, the writ of summons in the action was amended, the Famous Lasky Film Service, Ld., hereinafter called the second defendants, the Famous Players Lasky Corporation, hereinafter called the third defendants, and Mr. Chetham, hereinafter called the fourth defendant, being all joined as co-defendants.

The plaintiff stated in his amended statement of claim (para. 1) that he was the owner of the copyright of the dramatic work "Held by the Enemy" and of the performing rights thereof and therein, and of the sole liberty of representation and performance of the said work in Great Britain and Ireland and elsewhere, except in the United States; (para. 2) that the defendants, other than the fourth defendant, had, without the consent of the plaintiff, wrongfully and in breach of the plaintiff's copyright and rights as aforesaid made or caused to be made a cinematograph film by means of which the said dramatic work might be performed mechanically and had sold the same or copies or reproductions thereof and/or let the same and/or such copies for hire and/or had distributed for the purpose of trade the said film and/or the said copies thereof and had imported for sale or hire the said film and/or the said copies into the United Kingdom; (para. 3) that the fourth defendant was the proprietor and/or lessee of the said picturedrome and caused or permitted it to be

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used as aforesaid for the mechanical performance in public of the said dramatic work without the consent of the plaintiff, and in breach of the plaintiff's said rights; and that such performance was by means of a film or copy thereof supplied to the fourth defendant by the other defendants or one of them under an agreement of which the plaintiff was unable to give particulars until after discovery; and (para. 4) that the defendants intended, unless restrained, to repeat the said infringements; And that the plaintiff claimed: (i.) an injunction to restrain the defendants and each of them from exhibiting the said film and from otherwise infringing the plaintiff's copyright and/or performing rights and/or sole right of performance and representation in the said dramatic work by importing selling or letting on hire the said film and/or causing the same to be exhibited or performed or otherwise; (ii.) an account of the moneys and profits received by the defendants and each of them in respect of the sale, hire and/or exhibition or performance of the said work by means of the said film and/or any copies thereof and payment to the plaintiff of the amount thereof; (iii.) delivery up of the said film and all copies thereof to the plaintiff, and (iv.) damages.

The first defendants in their defence stated (para. 1) that they denied the subsistence of any copyright or performing rights or any other rights in the said dramatic work; (para. 2) that the author of the said dramatic work was not at any material time a British subject or resident within the United Kingdom; (para. 3) that the first public performance of the said dramatic work was given at the Criterion Theatre, in Brooklyn, New York, U.S.A., on February 22, 1886; (para. 4) that if (which was denied) any copyright performing right or other right subsisted in the said dramatic work the defendants did not admit the plaintiff's title thereto; (para. 5) that if (which was not admitted) the plaintiff had title to any such right as aforesaid he was entitled only to that part of the copyright which consisted of the right to perform the work on the stage by living actors and his right did not include the right to perform by means of a

cinematograph film or the right to make cinematograph films; (para. 6) that these defendants denied that they had infringed any right of the plaintiff; (para. 7) that these defendants admitted that they had imported into the United Kingdom, but denied that they had let on hire copies of a cinematograph film by means of which the said dramatic work might be mechanically performed; that if (which was denied) such copies infringed copyright or would have infringed copyright if made in the United Kingdom the defendants had no knowledge thereof; and that, alternatively, the defendants were not aware of the existence of copyright in the said dramatic work; (para. 8) that save as admitted these defendants denied that they had done any of the acts alleged in paras. 2 and 4 of the amended statement of claim; and (para. 9) that save as admitted they did not admit any allegation in paras. 2, 3, or 4 of the amended statement of claim.

The second defendants in their defence stated (para. 1) that they did not admit the subsistence of the copyright alleged or the plaintiff's title thereto; (para. 2) that these defendants denied that they had infringed any right of the plaintiff; (para. 3) that these defendants admitted that they had let for hire and had distributed for the purpose of trade copies of a cinematograph film by means of which the said dramatic work might be mechanically performed; that if (which was denied) such copies infringed copyright or would have infringed copyright if they had been made in the United Kingdom these defendants had no knowledge thereof; and that, alternatively, these defendants were not aware of the existence of copyright in the said dramatic work; (para. 4) that save as admitted these defendants denied that they had done any of the acts alleged in paras. 2 and 4 of the amended statement of claim; and (para. 5) that save as admitted they did not admit any allegation in paras. 2, 3, and 4 of the amended statement of claim.

The third defendants in their defence stated (para. 1) that they did not admit the subsistence of the copyright alleged or the plaintiff's title thereto; (para. 2) that they denied

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that they had infringed any right of the plaintiff; (para. 3) that they denied that they had done any of the acts alleged in paras. 2 and 4 of the amended statement of claim; and that, alternatively, if they did any such acts they had no knowledge that the cinematograph film or copies referred to infringed copyright or would have infringed copyright if they had been made in the United Kingdom; and (para. 4) that these defendants did not admit any of the allegations in paras. 2, 3, and 4 of the amended statement of claim.

The fourth defendant in his defence stated (para. 1) that he did not admit the subsistence of the copyright alleged or the plaintiff's title thereto; (para. 2) that he denied that he had infringed any right of the plaintiff; (para. 3) that he did not admit any of the allegations in paras. 2 and 4 of the amended statement of claim; that except that he did not admit that the performance was in breach of the plaintiff's rights, he admitted the allegations in para. 3 of the amended statement of claim; and that he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright; and (para. 5) that he did not desire or intend to repeat any of the acts alleged in para. 3 of the amended statement of claim.

In 1924 the evidence of Mr. Gillette was taken on commission in the United States.

On October 26, 27, and 28, and November 13, 1925, the action was tried by McCardie J. without a jury.

Evidence was given on behalf of the plaintiff and the defendants respectively in support of their allegations so far as these were in dispute. As evidence of the allegation that the first performance of "Held by the Enemy" took place in London on February 20, 1886, the plaintiff relied upon the letter of September 30, 1898, from Mr. Lestocq to the plaintiff, and upon a certified copy of an entry made in March, 1887, in the register of dramatic and musical copyright kept at Stationers' Hall, which entry, however, contained an error inasmuch as instead of stating that the plaintiff only was the author of the said dramatic work it stated that the plaintiff and a Mr. Chapman were the authors of that

work. On behalf of the defendants it was contended that neither that letter nor that entry was admissible as evidence of the first performance.

Merriman K.C. and *Storry Deans* for the plaintiff.

Sir Duncan Kerly K.C. and *Macgillivray* for the defendants.

The arguments advanced and the main authorities cited on each side appear from the judgment of McCardie J.

Nov. 13. MCCARDIE J. read the following judgment: This action raises several points of copyright law. The plaintiff sues the defendants for infringement of copyright in a dramatic work called "Held by the Enemy." The first and second defendants are English companies, the third defendant is an American corporation. The fourth defendant is the proprietor of a picture theatre at Bedford. The plaintiff claims the performing rights and the sole rights of representation and performance of the said play in Great Britain and Ireland. The defendants dispute the copyright claimed by the plaintiffs. The first three defendants further submit that in any event they cannot be held liable for infringement.

To state in detail the numerous facts and documents of the case and to analyse in detail the able and ample arguments of counsel and their review of the Copyright Act, 1911, would occupy an undue amount of space. I shall, therefore, state in the first place the broad facts of the matter. I shall then state in order the points of law raised by the defendants, and in connection with each point I shall briefly state any further circumstance which may call for mention. It will be convenient in view of the complexity of the case if from time to time I summarize the conclusions of fact or of law at which I have arrived. [His Lordship thereupon stated the facts of the case substantially as above set out, observing in the course of the statement that he accepted the evidence given on behalf of the plaintiff as to the events which occurred in 1898, that he attached importance to the words of the agreement of June 30, 1898, as bearing on the inferences of

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fact to be drawn in the case, and as touching the reliability of certain parts of the evidence of Mr. Gillette given on commission in America, and that he was satisfied that Mr. Gillette was fully cognizant of the litigation of 1910–11 and of the order of Horridge J. therein, and that Mr. Frohman and Mr. Lestocq were Mr. Gillette's agents in acting as they did and in consenting to that order. His Lordship thereupon continued as follows :] The defendants now assert that the plaintiff has no copyright at all. More than one of their contentions is of a far-reaching character, and would, if sound, strike a serious blow at rights which many American and foreign authors and their assignees believe themselves to possess.

Ere I pass to the contentions raised by the defendants' counsel, I think it well to point out that the rights, if any, possessed by the defendants, spring from a purported grant by Mr. Gillette himself. It is true that the defendants do not, in their defence, expressly plead any assignment or grant from Mr. Gillette. But the truth and substance of the matter is this : the third defendants, the Famous Players Lasky Corporation, are a powerful body corporate of the United States. On September 6, 1919, an agreement was made between them and Mr. Gillette. [His Lordship mentioned the provisions of this agreement above set out, and the consideration therefor, and continued :] From that agreement sprang the performances of "Held by the Enemy" by the defendant Chetham at Bedford in 1922. The first and second defendants were intermediaries, as I state later, between the third defendants and the fourth defendant with respect to those performances.

I now take the first point raised by the defendants. One additional fact only need be stated as to this point—namely, that in the year 1886 (when the plaintiff asserts that the first performance took place in this country) Mr. Gillette was a citizen of the United States and resident therein. He wrote the play there. Hence, the defendants submit that Mr. Gillette was unable to secure copyright in the play by a first performance in this country, and that as he (Mr. Gillette)

possessed no copyright, he could grant none to the plaintiff. The plaintiff, be it noted, does not claim literary copyright. The points of this case turn on performing rights only. The distinction between the two is pointed out in Copinger on Copyright, 5th ed., p. 79. Until 1833, there was no statute dealing with the right of the author of a dramatic composition to represent it in public. In that year, however, was passed the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15). In substance, that Act gave to the "author" of the play, or other dramatic piece of entertainment composed but not printed and published, the sole liberty of representation within the United Kingdom and the British Dominions. It is to be noted that the Act gives no indication as to whether the author must be resident within the British Empire at the date of the first publication. The rights begin from the date of that publication. In *Boucicault* v. *Chatterton* (1) James L.J. said: "A dramatic piece or a musical composition is published by being publicly performed." Now could Mr. Gillette, as a non-resident alien, secure copyright for his play? The defendants submit that the answer is: No, and they rely on *Jefferys* v. *Boosey*. (2) In that case the House of Lords seem to have decided that under the well known statute of 8 Anne, c. 19, an alien could not acquire copyright in England if he were on foreign soil at the moment of publication in the United Kingdom. If that decision governs the present facts, the plaintiff fails in limine. It was said by the House of Lords that the object of 8 Anne was to encourage literature amongst British subjects, including such foreigners as by residence here owe the Crown a temporary allegiance. The words in 8 Anne, c. 19, were "the author of any book." I think that the decision in *Jefferys* v. *Boosey* (2) must be taken to have turned on the wording, scope, and circumstance of that particular statute. That was the view of Lord Westbury and Lord Cairns in *Routledge* v. *Low* (3) when dealing with the Copyright Act, 1842. Each statute bearing on copyright must receive separate consideration.

(1) (1876) 5 Ch. D. 267, 275. (2) (1854) 4 H. L. C. 815.
(3) (1868) L. R. 3 H. L. 100.

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There has been no actual decision that the word "author" in the Act of 1833 is to be limited to those who were resident within British territory. On the contrary, the opposite view has been taken in practice. If a limited area should be given to the operation of the Act of 1833, the result would be to inflict serious injury on many of the Continental and American authors and on those who have derived title from them. I do not propose to inflict that unfortunate result unless there is strong ground for doing so. I may point out that the Act of Anne was repealed by the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 1. I do not think that any effective light is thrown on the point before me by that Act of 1842. But in my view, the International Copyright Act, 1844 (7 & 8 Vict. c. 12), is significant. It seems to me that in order to give adequate effect to that Act it is necessary to yield a further meaning to the word "author" in the Act of 1833 than that word may have possessed under the statute of Anne. I do not pause to analyse the Act of 1844, or to indicate the curious results which might arise if the word "author" in the Act of 1833 had received the limitation suggested by the defendants here. I hold that under the Act of 1833 a foreign author dwelling outside British territory could, in law, secure dramatic copyright within the British Empire if the first performance was given in this country. I am glad to feel that my opinion is agreeable to the view of the profession. It is a view, moreover, which seems fully consonant with the wording of the second section of the Naturalisation Act, 1870 (33 & 34 Vict. c. 14). I am strengthened in my opinion by the passage in Copinger, 4th ed., p. 97, where it is said: "It is therefore only reasonable to suppose that when this question next arises our Courts will give their decision in accordance with the views expressed by Lord Cairns and Lord Westbury in the case of *Routledge* v. *Low*. (1)" Finally, I may point out that my opinion is, I think, supported by Scrutton on Copyright, 4th ed., pp. 128 and 129, and by the view of the law officers of the Crown in 1891 as stated in Macgillivray's Law of Copyright, p. 45.

(1) (1868) L. R. 3 H. L. 100.

I take now the second point raised by the defendants. They contend, should they fail on their first point, that (*a*) the first performance of "Held by the Enemy" did not take place in this country, and (*b*) that even if it did so take place here yet that Mr. Gillette did not authorize such first performance. The plaintiff will have no performing rights unless a first performance of the play took place within British territory. The plaintiff here asserts that the first performance was given in London and that it took place on February 20, 1886, at the Ladbroke Hall, Notting Hill. The defendants assert that the first performance took place at New York on February 22, 1886, and they refer to s. 19 of the International Copyright Act, 1844. Now here no witness was called before me for the plaintiff to prove from actual personal knowledge a first performance here in England on February 20, 1886. The question of fact in dispute must therefore be decided on documents, inference, and presumption. The plaintiff relies strongly on the letter, already cited in this judgment, from Mr. Lestocq, Mr. Gillette's agent, dated September 30, 1898, stating in the clearest way that the first performance took place here in London on February 20, 1886. If that letter be receivable in evidence, it constitutes a weighty admission against the defendants. Is it admissible? The plaintiff says, Yes; the defendants say, No. It is a document which was revealed on discovery of documents by the defendants, who had obtained it from the solicitors who had acted for Mr. Gillette and his agents in the litigation already referred to of 1910–1911. It is a copy only of the original, which has been lost, but no one, of course, suggests that it is not a correct copy. The plaintiff proved that he had received the letter. Is it admissible in evidence? Upon the whole, I think that the answer is, Yes. It was written by Mr. Gillette's agent and it therefore constitutes an admission by Mr. Gillette. This being so, I take the view that it is here admissible against the defendants on two grounds: firstly, I think that it is an admission by a person who, though not named on the record, has a substantial interest in the result. Here, Mr. Gillette has a most substantial interest in the question in dispute,

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and the defendants are fighting this action to a very large extent for his benefit and with his support. To discuss the authorities would take too long a space; they are referred to in Phipson on Evidence, 6th ed., p. 237. Secondly, I think that it is receivable as an admission by the defendants' predecessors in title. Here, again, I do not discuss the authorities in detail. They are dealt with concisely in Phipson, 6th ed., pp. 238 to 240. The two specific decisions cited by Mr. Merriman in his able argument for the plaintiff tend, I think, to support my view. They are *Woolway* v. *Rowe* (1) and *Smith* v. *Smith*. (2)

In my opinion the admission contained in the letter is strikingly corroborated by the entry made at the Stationers' Hall in March, 1887. In the fifth column of the register appears the following (inter alia): "Time and place of first representation or performance: 20th February, 1886, Ladbroke Hall, Notting Hill, London, W." This entry was made, it will be noted, about a year only after the first performance. The weight of the entry is increased when I mention one or two points for consideration. In the case of performing rights, registration was not essential. The right could exist and could be enforced by action without registration: see s. 24 of the Copyright Act, 1842; Copinger on Copyright, 4th ed., p. 282; and *Clark* v. *Bishop*. (3) But though not essential, yet registration could be effected if desired: see s. 20 of the Copyright Act, 1842. If registration was made under that section then an entry was required by the authorities of the time and place of first performance. The practice at Stationers' Hall is well known, and it was formally proved before me. It is stated in Halsbury, vol. 8, p. 180, and in Strong on Dramatic and Musical Law, 3rd ed., p. 86. Stationers' Hall would not register until satisfied of the date and place of first performance. They required production of a programme with the names of the cast and the date. The register was a public one. False entries were punishable under s. 12 of the Copyright Act, 1842, and persons

(1) (1834) 1 Ad. & E. 114. (2) (1836) 3 Bing. (N. C.) 29.
(3) (1872) 25 L. T. 908.

aggrieved could move the Court, under s. 14, to rectify. Hence, I think that the register falls within the rules of law as to public registers indicated in Phipson on Evidence, 6th ed., p. 339, and following. Moreover, s. 11 of the Copyright Act, 1842, makes a certified copy of the entry prima facie evidence of the right of representation. A certified copy was produced before me. The defendants, however, take the point that it is not admissible at all inasmuch as the entry contains an error — namely, that instead of giving the name of Mr. Gillette only as author, it gives the names of Mr. Gillette and a Mr. Chapman as authors. That admittedly is an error. Hence, the defendants submit that the certified copy is inadmissible as evidence of the first performance. They rely on the cases cited in Copinger, 4th ed., pp. 115 and following. They concede that an incorrect entry does not destroy the plaintiff's title if he can prove that title aliunde: see *Hardacre* v. *Armstrong* (1), per Wills J.; but they say that the entry, if incorrect, precludes any reliance on the entry for any purpose. I think that this submission goes too far. I agree that the error in the entry may preclude the plaintiff from relying on the certified copy as prima facie proof of title; but I do not think I am precluded by the decisions from looking at the entry as corroborative of Mr. Gillette's agent's letter of September 22, 1898. I may mention as further corroboration of the first performance here on February 20, 1886, that the plaintiff has produced a contemporary copy of the well known theatrical journal The Era, which gives the date and place of first performance as February 20, 1886, at Ladbroke Hall, and he has also produced a copy of the Referee, which further gives the names of the fifteen members of the cast on that first performance. I am satisfied on the material before me, that the first performance did take place on February 20, 1886, at Ladbroke Hall, Notting Hill.

The defendants then submitted that in any event the first performance here did not take place with the authority of

(1) (1905) 21 Times L. R. 189.

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Mr. Gillette. They rely on the evidence of Mr. Gillette, taken in New York on commission. As to that evidence, I need only say that in my opinion the evidence of Mr. Gillette is not reliable, nor is his memory accurate. The whole of the circumstances of the case, including the correspondence and documents, and particularly the letter of September 22, 1898, lead me to the inference that the first performance took place in this country with the knowledge and assent of Mr. Gillette. I draw that inference here just as Bruce J. drew an inference of assignment in *Dennison* v. *Ashdown* (1), and just as the Court drew inferences of fact in such decisions as *Munro, Bruce & Co.* v. *Marten* (2) and *La Compania Martiartu* v. *Royal Exchange Assurance Corporation.* (3)

The defendants' next main point is this: they refer to the wording of the Copyright Act, 1911, and submit that even if the plaintiff had rights of performance prior to the coming into operation of that Act on July 1, 1912, yet that the words of that Act of 1911 are not adequate to protect and continue to him his theretofore existing rights. This is a serious point, if well founded, not only to the plaintiff but to many others. I confess that I agree with counsel as to the obscurity of the Copyright Act, 1911, in many respects. To analyse the arguments on the point now in question would involve a large amount of time. Briefly put the matter stands thus: Sect. 1 of the Copyright Act, 1911, deals with the works in which copyright shall exist. It says: "(1.) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereafter mentioned in every original literary, dramatic, musical and artistic work, if—(*a*) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and (*b*) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid; but in no other works, except so far as the

(1) (1897) 13 Times L. R. 226. (2) [1920] 3 K. B. 94.
(3) [1924] A. C. 850.

protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries." Sect. 1, sub-s. 3, says : " For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work. . . . ." The defendants also refer to s. 35, sub-s. 3, of the Act, to the policy of the Act as indicated in ss. 23 and 29, and to Orders in Council No. 913 of 1912 and No. 130 of 1915. In substance, the defendants say that the plaintiff does not fall within s. 1, sub-s. 1 (*a*), because " Held by the Enemy " was not first published within the King's dominions, inasmuch as by reason of sub-s. 3 of s. 1 the first performance of February 20, 1886, was not a publication within s. 1, sub-s. (*a*). The plaintiff cannot, of course, invoke head (*b*) of s. 1, sub-s. 1, because the author was not at the date of the making of the work a British subject or resident in British territory. If the defendants are right in their contention, it will follow that the plaintiff has no performing rights at all, inasmuch as the Act of 1911 has destroyed them, and indeed it will also follow that even a British author resident within British territory at the time of the first performance of his play before July, 1912, might lose his rights. This would indeed be a singular result to follow from an Act intended to enlarge and protect authors and their assignees.

Now, what is the answer to this point of the defendants ? In my view the answer is that s. 1, sub-s. 1, of the Act of 1911 is referring to the future and not to the past. It prescribes conditions as to the future. It does not inflict those conditions on past events so as to destroy any existing rights. The Copyright Act of 1833 was repealed by the Act of 1911 ; but by s. 38, sub-s. 2, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), that repeal did not affect any right accrued under the earlier Acts. None but the clearest words could have that effect. See the authorities referred to in *Bowling* v. *Camp* (1) and *Henshall* v. *Porter*. (2) See also,

(1) [1922] W. N. 297; 128 L. T. 342.

(2) [1923] 2 K. B. 193.

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as to the effect of the Interpretation Act, *Evans* v. *Morris* (1), per Phillimore J. and Pickford J. The scheme of the Act of 1911 is not a destruction of rights, but rather the maintenance of those rights by a method of liberal substitution and enlargement. Hence the plaintiff, entitled as he was on July 1, 1912, to the performing rights in "Held by the Enemy," obtained by s. 24 of the Copyright Act, 1911, the substituted right set out in the First Schedule of the Act—namely, "the sole right to perform the work in public." The view I have ventured to indicate gives, I hope, a just and effective interpretation to the Copyright Act, 1911.

I now turn to the fourth main point submitted by the defendants. In substance, if I understand their argument rightly, they contend that even if the plaintiff possessed, when the Copyright Act of 1911 came into operation, the sole right to perform the work in public, yet that such right did not carry with it the cinema or film rights but is limited to actual theatrical performances. Again, I do not pause to analyse the arguments. In my view the rights possessed by the plaintiff by virtue of the Copyright Act, 1911, must be considered in the light of several sections. In the first place, s. 1, sub-s. 2, announces that copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, and that it shall include (inter alia) the sole right (*a*) to produce, reproduce, perform, or publish any translation of the work; and (*d*) "in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered," and to authorize any such acts aforesaid. In the second place, s. 24 and the First Schedule gave the plaintiff the sole right to perform the work in public. In the third place, s. 35, the definition clause, defines "performance" as meaning "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." Taking these provisions as a

(1) [1913] W. N. 58.

whole, I am of opinion that the plaintiff is now possessed of the cinema or film rights in this country of "Held by the Enemy." This view is, I think, fully in accord with the opinion of Eve J. in *Barstow* v. *Terry* (1), and also, I hope, with the views of the Court of Appeal in *Serra* v. *Famous Lasky Film Service, Ld.* (2)

I must now deal with the fifth main point of the defendants in this complex case. It touches the first three defendants. Here I must summarize a few facts and documents. There are several intricate documents which govern the position inter se of the first three defendants. In substance, the matter stands thus: the third defendants, the Famous Players Lasky Corporation, are a United States of America film manufacturing concern. Acting under the already mentioned agreement of September 6, 1919, with Mr. Gillette, they made in the United States the film of "Held by the Enemy." They then sent over to the first defendants, the Famous Players Film Co., Ld., who are an English company, the negative and two positives of the film. These first defendants then made further copies of the film and handed them to the second defendants, the Famous Lasky Film Services, Ld., also an English company, for the purpose of being let out in this country. The second defendants then let out the film to the fourth defendant, Robert Chetham, for actual exhibition, on the terms that he should pay a share of the receipts to them, the second defendants. The defendant Chetham then exhibited the film at his picturedrome in Bedford. The three first defendants are interlinked and interworking organizations, and their operative relations inter se are shown by several complex agreements. A substantial share of receipts from the actual exhibition of the film "Held by the Enemy" passed to the coffers of the second defendants, then to the coffers of the first defendants, and then to the coffers of the third defendants. Such are the broad facts so far as they need to be stated for the purpose of the fifth main point raised by the defendants' counsel in their exhaustive and able array of arguments upon the meaning and scope of

(1) [1924] 2 Ch. 316, 323. (2) [1922] W. N. 44; 127 L. T. 109.

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the Copyright Act, 1911. So far as any question of the statement of claim arises, I allow any amendment needed to cover the facts of the case. Now, the defendants' point is that upon the facts as I have stated them, the first three defendants have not committed any act which upon the true interpretation of the Copyright Act, 1911, affords any cause of action to the plaintiff. They say that there is no wrongful act by the three first defendants unless they actually perform "Held by the Enemy." In other words, they say that the decision of the Court of Appeal in *Karno* v. *Pathe Freres* (1) remains as an authority which is unimpaired by the provisions of the Copyright Act, 1911. This seems to be a point of serious practical importance. In substance *Karno's* case (1) apparently decided (inter alia) that a person did not infringe dramatic copyright under the Act of 1833 unless he by himself or his agent actually took part in the representation which is a violation of the copyright. Now, the Copyright Act, 1911, as I said, is obscure on many points. The provisions more directly bearing on the point before me are several: (*a*) s. 1, which I have already quoted with respect to the meaning of copyright; (*b*) s. 2, sub-s. 1: "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright"; (*c*) s. 2, sub-s. 2: "Copyright in a work shall also be deemed to be infringed by any person who (*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire"—and so on, (*b*), (*c*) and (*d*)—"any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition or importation took place." Then follows sub-s. 3 of s. 2. I must also here mention s. 8, which was invoked by the defendants on this as well as on a further point. Sect. 8 says: "Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence

(1) (1909) 100 L. T. 260.

alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work." The defendants pleaded s. 8 in their defence. It will at once be seen how easily the then apparently conflicting provisions presented matter of argument to counsel in an endeavour to give a consistent and intelligible meaning to the Act. Sect. 2 (i.) might appear to make any infringer liable whether he possessed knowledge or not; s. 2, sub-s. 2, might appear to make a person liable for the specified and particular sets of acts only if the plaintiff proved knowledge. Sect. 8 might seem to cut down a defendant's liability only if he, the defendant, proved absence of knowledge and absence of reasonable grounds for suspicion that copyright existed. Again, I will not pause to analyse the arguments of counsel. I will state briefly the conclusions I reach. The Act of 1911 constitutes a new code. It creates on the whole wider rights and gives larger remedies.

Now, in the present case the fourth defendant, Chetham, actually infringed the plaintiff's rights. He committed a tort. It follows, I think, that the question is whether the other three defendants fall within the rule of law I ventured to state in *Performing Right Society, Ld.* v. *Mitchell & Booker (Palais de Danse), Ld.* (1) I there said that the question was whether the defendants had actually directed, counselled or aided the infringement: see per Tindal C.J. in *Petrie* v. *Lamont* (2); *M'Laughlin* v. *Pryor* (3); and *Cargill* v. *Bower.* (4) I also referred to the words of Bowen L.J. in *Donovan* v. *Laing, etc., Syndicate* (5) and to *Marsh* v. *Conquest.* (6) In the present case I hold on the facts before me that the first three defendants actively directed, counselled or aided the actual infringement by the fourth defendant. I therefore rule that

(1) [1924] 1 K. B. 762, 765.
(2) (1841) Car. & M. 93, 96.
(3) (1842) 4 Man. & G. 48.
(4) (1878) 10 Ch. D. 502, 513, 514.
(5) [1893] 1 Q. B. 629, 634.
(6) (1864) 17 C. B. (N. S.) 418.

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all four defendants have infringed the plaintiff's rights within s. 2, sub-s. 1, of the Act. In my opinion neither sub-s. 2 of s. 2 nor sub-s. 3 of s. 2 cut down the operative effect of sub-s. 1 of s. 2; on the contrary, sub-ss. 2 and 3 of s. 2 enlarge a person's liabilities beyond those indicated in sub-s. 1 of s. 2. They impose new and additional responsibilities and create new wrongs. The word "also" in sub-ss. 2 and 3 should be noted and given due effect to.

I hope that this conclusion accords with the ratio of the decisions of the Court of Appeal in *Performing Right Society, Ld.* v. *Ciryl Theatrical Syndicate, Ld.* (1), and with the decision in *Fenning Film Service, Ld.* v. *Wolverhampton, etc., Cinemas, Ld.* (2), and *Evans* v. *Hulton & Co.* (3) It seems to me that when an infringement within s. 2, sub-s. 1, is shown no question of knowledge arises, except possibly with regard to remedies under s. 8: see Copinger, 5th ed., p. 135.

It follows from what I have said that it is not strictly necessary to decide whether or not the first three defendants fall not only within sub-s. 1 of s. 2, but also within sub-s. 2 of s. 2; apparently as to sub-s. 2 of s. 1 the onus falls on the plaintiff to prove the knowledge (see Copinger, 5th ed., p. 166) required by that sub-section. It is, however, better to decide the point. Taking the whole of the documents and facts in this case and the relation of the defendants with Mr. Gillette, and the defendants' sources of information, I hold that the defendants had knowledge within sub-s. 2 of s. 2. Ere reaching this conclusion I have considered (inter alia) *Byrne* v. *Statist Co.* (4); the reasoning in Copinger on Copyright, 5th ed., p. 206, as to s. 8, and the ratio of such decisions as *Jones* v. *Gordon.* (5)

A final point was faintly argued for the defendants on s. 8 of the Copyright Act. That section was pleaded in the defence. I need only refer to Copinger on Copyright, 5th ed., pp. 203 to 205, as to the considerations which arise on s. 8. The defendants gave no evidence in support of their plea

(1) [1924] 1 K. B. 1.
(2) [1914] 3 K. B. 1171.
(3) [1924] W. N. 130; 40 Times L. R. 489.
(4) [1914] 1 K. B. 622.
(5) (1877) 2 App. Cas. 616.

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under s. 8. It follows from my prior finding of fact that the defendants cannot rely on that section.

In the result, therefore, I find for the plaintiff. I give judgment in his favour. He is entitled to the remedies indicated by ss. 6 and 7 of the Copyright Act, 1911. The form of injunction can be considered by counsel and also the general form of the judgment. I will deal with the question of costs finally on a later day, after hearing counsel.

Judgment for plaintiff.

Solicitors for plaintiff: *Stanley, Hedderwick & Co.*
Solicitors for defendants: *Kerly, Sons & Karuth.*

J. R.

CLAYTON AND OTHERS *v.* SALE URBAN DISTRICT COUNCIL.

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Nov. 12, 13.

Nuisance—Flooding of Land adjoining River—Breach in Flood Bank—Liability of riparian Owner to abate Nuisance—No Agreement to maintain Bank—Nuisance arising from "act, default, or sufferance" of Owner—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 94.

Where a nuisance has arisen on land adjoining a river by flooding through a breach in the flood bank thereon, the owner of the land may, under the Public Health Act, 1875, s. 94, be required to abate the nuisance, if it be found that the nuisance arose or continues by his "act, default, or sufferance," notwithstanding that, apart from that section, he is under no obligation by contract or otherwise to maintain or repair the flood bank.

Thames Conservators v. *Port Sanitary Authority of the Port of London* [1894] 1 Q. B. 647 distinguished and observations considered.

Attorney-General v. *Tod Heatley* [1897] 1 Ch. 560 applied.

CASE stated by justices for the county of Chester.

On March 9, 1925, a complaint was made by the Sale Urban District Council, the respondents, against Emma J. B. Clayton and others, the appellants, alleging that notice under the Public Health Act, 1875, s. 94 (1), was served upon

(1) Public Health Act, 1875, s. 94: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied

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the appellants as owners of land and premises adjoining the River Mersey and within the Sale urban district to abate a nuisance on land and premises adjoining that river and situate within the said urban district, of which land and premises the land and premises of the appellants formed part, the said nuisance arising from constant flooding of the said land and premises by water from the river admitted through a breach in the flood bank on the appellants' land and premises whereby the said land and premises were submerged and deleterious material was deposited thereon, causing the same to be so foul as to be a nuisance or injurious to health, and which nuisance was caused through the default of the appellants in allowing the said breach to be and to remain, and that the appellants had made default in complying with the notice.

At the hearing of the complaint the following facts were proved or admitted: A notice dated January 7, 1925, to abate the nuisance complained of within forty-two days from the service thereof was duly served upon the appellants by the respondents. The appellants had not abated the nuisance in accordance with the notice or at all. The appellants were the owners of the said portion of the said lands and premises comprising 16 acres 3 roods 14 perches, and having a frontage on the river. Before the river reached the appellants' land and premises large quantities of sewage and industrial effluents and some untreated sewage had been passed into it. The appellants' land and premises and adjoining land and premises on each side of the appellants' land and premises, and land and premises on the opposite bank of the river, were protected from the river by artificial flood banks which were constructed of earth, clay, gravel, stone,

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of the existence of a nuisance, serve a notice on the person by whose act default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same. . . . . Provided: . . . . Secondly, that where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act default or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order."

and like materials, and were of a height approximately twelve feet above the normal level of the water in the river. The flood banks were constructed so long ago that no record could be found of their construction. Other riparian owners of the lands and premises adjacent to the river had carried out repairs to the flood banks on their respective lands and premises. The flood bank on the appellants' land was not in a state of proper repair. In or about February, 1920, during a heavy rainfall the flood bank on the appellants' land gave way, causing a breach in the flood bank on the appellants' land through which water of the river was admitted on to and flooded the appellants' said land and adjoining land and premises, the flooded land and premises within the urban district of Sale being of an area approximately 349 acres. The breach in the flood bank had not been repaired and/or made good, with the result that the area last mentioned had become subject to floods from the river and had been more frequently flooded. The flooding of the said land and premises whereby they were submerged and deleterious matter was deposited thereon constituted a nuisance. The breach had gradually increased in size since the flood bank gave way, and at the date of the hearing of the complaint it was conterminous with the boundary of the appellants' land. The breach could have been repaired by reconstructing the flood bank on the appellants' land and the nuisance thereby abated.

On March 25 and 26, 1925, the complaint was heard by the justices sitting at Sale.

On the part of the appellants it was contended that the appellants were under no obligation either at common law or by statute or by agreement or at all to repair the banks of the river; that the nuisance did not arise or continue by any act, default, or sufferance of the appellants; that the nuisance was not and was not proved to be caused by the flooding of the portion of the land belonging to the appellants; that the nuisance did not and was not proved to exist upon the said portion, but only existed and was only proved to exist upon other parts of the land than the portion belonging

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to the appellants; that inasmuch as the breach extended beyond the boundary of the land belonging to the appellants on to land belonging to others the nuisance could not be caused exclusively by water admitted through that portion of the breach which existed on the appellants' portion of land; that the appellants could not be ordered to repair or make good the breach, as to do so would necessitate a trespass by the appellants on land not belonging to them; and that if the appellants were ordered to repair and make good the breach on their land the doing so by them would not abate the nuisance, as the breach would continue on the said land belonging to others.

On the part of the respondents it was contended that the nuisance arose through the default of the appellants in not maintaining the flood bank of the river on their land and premises in a state of proper repair, and/or in suffering that flood bank to be in a state of non-repair; that it was the duty of the appellants to maintain that flood bank in a state of proper repair; that the nuisance continued through the default of the appellants in failing to make good and to repair the breach in that flood bank and in suffering it to be and to remain; that it was the duty of the appellants to make good and to repair the breach in the flood bank; that it was the duty of the appellants to prevent their land and premises from being a nuisance and to abate the nuisance therein, and to prevent the said water and deleterious matter from coming on to their land and premises and from spreading thence on to the rest of the 349 acres; that the nuisance arose and continued by the act, default, and sufferance of the appellants, whereby the water of the river was admitted through the breach in the flood bank on the appellants' land and constantly flooded the area of 349 acres; that the breach at the date of the service of the notice to abate was well within the boundaries of the appellants' land and at the date of the hearing was coterminous with the boundary of that land; and that that breach could be repaired and made good by the reconstruction of the flood bank on the appellants' land.

The justices were of opinion that the said nuisance did exist upon the said area of approximately 349 acres and that the said nuisance was caused by the act, default, and sufferance of the appellants in failing to make good the said breach in the said flood bank of the River Mersey and in suffering the said breach to be and to remain, and in suffering water and deleterious matter to flow more frequently on to the appellants' said land and thence on to the rest of the said 349 acres; and they therefore ordered the appellants within nine months from the service of their order or a copy thereof according to the said Act to make good the said breach in the flood bank by reconstructing the same on the appellants' land so as to be of sufficient strength to restrict the river to the course prior to the said breach.

The question for the Court was whether the justices upon the above statement of facts came to a correct determination and decision in law, and if not what should be done in the premises.

Wingate-Saul K.C. (*Harold Rhodes* with him) for the appellants. The appellants cannot be required to abate the nuisance under the Public Health Act, 1875, s. 94. The justices were wrong in finding that the nuisance was caused by the act, default, and sufferance of the appellants in failing to make good the breach in the flood bank, and in ordering them to make it good. This case resembles that of *Thames Conservators* v. *Port Sanitary Authority of the Port of London* (1), and it should be similarly decided. In that case a nuisance, the makers of which could not be found, existed upon the shore of the Thames, the bed and shores of which were vested in the conservators, and in proceedings against them to abate the nuisance under provisions of the Public Health (London) Act, 1891, which are substantially identical with the section here in question including the proviso, it was held that the conservators could not be required to abate the nuisance, as it did not appear that it arose by their act, default, or sufferance. The

(1) [1894] 1 Q. B. 647.

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true ground of the decision in that case appears from the earlier part of the judgment of Lord Coleridge C.J. where he said: "It would be easy to suggest cases in which great injustice would be worked if we did not construe this section with the proviso as we propose to construe it. A great sewer might burst, causing a nuisance on some person's land; but it would not be by the act, default, or sufferance of the owner or occupier of that land that the sewer had burst and the nuisance been caused. . . . . The plain meaning of that proviso is that before the liability of the owner or occupier arises . . . . the nuisance must continue by the act, default, or sufferance of the owner or occupier." (1) And in *Nathan* v. *Rouse* (2) Lord Alverstone C.J. expressed the view that the liability to abate the nuisance under these provisions depends upon the obligation to prevent the nuisance. It appears from these observations that before a nuisance can arise or continue by the act, default, or sufferance of the owner of the land within the meaning of this section, not only must a nuisance exist upon the land, but the owner must have been under some obligation apart from the section, by agreement or otherwise, to prevent the nuisance from arising or continuing, and must have disregarded that obligation. The present appellants were not under any obligation to do anything to prevent the nuisance from arising or continuing. They were under no obligation to maintain or repair the flood wall. An obligation of that kind can only arise by prescription, custom, ratio tenuræ, frontage, covenant or grant: see Halsbury's Laws of England, vol. xxv., pp. 783–4; and *Hudson* v. *Tabor* (3), and there is here no evidence to show that it had arisen from any of these sources. If the appellants were to rebuild this part of the flood wall they might cause the flood water to endanger the Bridgwater Canal, or destroy other parts of the flood wall and obstruct the navigation of the river, and so render themselves liable to be sued for trespass or indicted for nuisance: *Rex* v.

(1) [1894] 1 Q. B. 654. (2) [1905] 1 K. B. 527.
(3) (1877) 2 Q. B. D. 290.

Trafford. (1) This nuisance was not created by the act, default, or sufferance of the appellants but by the act, default, or sufferance of persons unknown or by some act of nature such as an unusually heavy rainfall. At the hearing before the justices the respondents relied upon *Attorney-General* v. *Tod Heatley* (2), where it was held that an owner of land is under a duty at common law to prevent the land from becoming a public nuisance. That case, however, has no application to the present case, in which the proceedings taken against the appellants are not to enforce a common law duty but an alleged statutory duty under s. 94. Here the person who caused the nuisance cannot be found, and the nuisance did not arise by the act, default, or sufferance of the appellants as owners of the land, and therefore under s. 94 it is for the respondents themselves to abate the nuisance.

Cyril Atkinson K.C. (*William Gorman* with him) for the respondents: The decision and the order of the justices were right. The nuisance arose and continues by the act, default, or sufferance of the appellants as owners of the land, within the meaning of s. 94 of the Act of 1875. The ground of the decision in *Thames Conservators* v. *Port Sanitary Authority of the Port of London* (3) does not appear from the earlier part of the judgment of Lord Coleridge C.J. in that case, but from the latter part of his judgment and from the judgment of Mathew J., which show it to have been that on the true construction of the statutes by which they were constituted the conservators were owners of the bed and shores of the river for certain purposes only and not for the purposes of a section similar to s. 94. That being so that case is distinguishable from the present case, in which the appellants are owners of the land in question for all purposes, including those of s. 94. If the earlier observations of Lord Coleridge C.J. bear the meaning attributed to them by the appellants, then they were unnecessary for the decision in that case and were mere obiter dicta. The principle applicable to

(1) (1831) 1 B. & Ad. 874. (2) [1897] 1 Ch. 560.
(3) [1894] 1 Q. B. 647.

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the present case is that which was applied in *Attorney-General* v. *Tod Heatley* (1) and *Margate Pier Proprietors* v. *Margate Corporation* (2), and which is clearly stated by Lindley L.J. in the former case—namely, that at common law it is the duty of the owner of a piece of land to prevent it from being so used as to be a public nuisance. Here, it was the duty of the appellants to prevent this nuisance by flooding from arising or continuing. They might have prevented the nuisance from arising or continuing by maintaining or repairing the flood bank on their land. Their failure to maintain or repair the flood bank was therefore an act, default, or sufferance by which the nuisance arose within the meaning of s. 94.

Wingate-Saul K.C. replied.

LORD HEWART C.J. This is a case stated by justices upon the hearing of a complaint made on behalf of the respondents, the Urban District Council of Sale, against the appellants under s. 94 of the Public Health Act, 1875. The allegation of the respondents was that a nuisance upon the appellants' land arose from a constant flooding of that land by water from the River Mersey, that that water was admitted through a breach in the flood bank on a part of the appellants' land whereby that land became submerged and deleterious material was deposited upon it so that the land became foul and injurious to health, and that that nuisance was caused through the default of the appellants in allowing the breach in the flood bank to be and to remain.

Among the facts which are found in the case are these. [His Lordship stated the material facts and continued:] It was urged before the justices, as it has been urged before us, that the appellants were under no obligation to repair the bank or any part of it. The justices came to the conclusion that the nuisance did exist upon the land referred to, and that the nuisance was caused by the act, default, and sufferance of the appellants in failing to make good the breach in the

(1) [1897] 1 Ch. 560. (2) (1869) 20 L. T. 564.

flood bank and in suffering that breach to be and to remain, and in suffering water and deleterious matter to flow more frequently on to the appellants' land and thence on to the rest of the 349 acres.

The question raised by the case is whether the justices came to a correct determination and decision in law. The answer to that question depends upon the true construction of s. 94 of the Public Health Act, 1875, and especially of certain phrases contained in that section. The scheme of the section is sufficiently clear. The local authority being informed of the existence of a nuisance begins by endeavouring to find the person by whose act, default, or sufferance the nuisance arises or continues, and on finding him they serve a notice on him requiring him to abate the nuisance. It is important to observe that in that part of the section the two words are employed, "arises or continues." The section goes on to deal with the case where that person cannot be found, and in that case the notice to abate the nuisance is to be served upon the owner or occupier of the premises on which the nuisance arises. There follow two provisoes, the first of which is not material for the purposes of the present case. The second proviso is: "That where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default, or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order."

It is here common ground that the appellants were the owners of the land on which the nuisance arose, and the question before the justices was whether it was true to say that the nuisance arose or continued by the act, default, or sufferance of the appellants as owners of the land.

The case which has been put forward in this Court on behalf of the appellants has proceeded throughout upon the view or contention that there cannot be a default by the owner within the meaning of s. 94 of the Act unless there has been on his part a breach of an obligation arising independently of the section from an agreement or otherwise. It is said

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that in the present instance there was no obligation on the part of these appellants arising from any agreement or covenant or otherwise to construct or to repair the flood bank in the place referred to, and as there was no such obligation so also there could be no default on their part. In support of that proposition stress has been laid upon a particular part of a judgment in the case of *Thames Conservators* v. *Port Sanitary Authority of the Port of London* (1), in which it was held that the conservators of the River Thames were not liable to abate a nuisance existing on the foreshore of the river. It is to be observed, however, that in that case it was found that the appellants were owners of the soil and foreshore of the river for certain specific purposes only, and not for the purposes of s. 4 of the Public Health (London) Act, 1891, the terms of which are similar to those of the section here in question. Moreover the appellants there were a public body, and while certain statutes conferred their powers and regulated their duties, no statute empowered them to scavenge or to remove nuisances in the portion of the river referred to, nor did their power of raising funds include a power of raising money for the sanitary improvement of that portion of the river. It is with reference to those facts therefore that the judgments in that case have to be considered. It is true that there are passages in the judgment of Lord Coleridge C.J., though not in the judgment of Mathew J., as he then was, which seem to depend upon the fact that the appellants were not liable merely as owners of the land on which the nuisance arose. I think, however, that it is right, with all respect, to make two observations upon that particular part of the judgment of Lord Coleridge C.J. The first observation is that upon a fair reading of the whole passage referred to, the true interpretation of it appears to be that the learned judge was impressed by the fact that the appellants had not the power to do the acts referred to or to expend money about doing them. The other observation is, that if that passage did indeed bear the meaning contended for by the appellants in the

(1) [1894] 1 Q. B. 647.

present case, it would not be necessary to the decision of the case, but would be merely obiter.

In my opinion the act, default, or sufferance referred to in s. 94 of the Public Health Act, 1875, is an act, default, or sufferance related to the nuisance which it is sought to abate, and default no less than sufferance within the meaning of that section can occur without the breach of an obligation arising from contractual agreement. In the case of *Attorney-General* v. *Tod Heatley* (1) Lindley L.J. said: "Now is it, or is it not, a common law duty of the owner of a vacant piece of land to prevent that land from being a public nuisance? It appears to me that it is. Turning to the books on criminal law to which we are accustomed to go for information about such matters as this, and taking Hawkins' Pleas of the Crown, which is one of the best, I find that in his chapter on Nuisances he says (8th ed., vol. i., p. 692, s. 1), it seems that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the King's subjects, or by neglecting to do a thing which the common good requires. If the owner of a piece of land does permit it to be in such a state, e.g., smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say, 'I did not put the filth on but somebody else did.' He must provide against this if he can. His business is to prevent his land from being a public nuisance." (2) Again, the learned Lord Justice said: "I cannot for a moment entertain the slightest doubt that it is the common law duty of this gentleman to prevent that piece of land from continuing as a public nuisance. That it is a public nuisance is beyond all controversy. There is no question at all about that." (3) Those passages seem to me to be even in a peculiar degree applicable to the facts of this case, and the principle which is there laid down is the principle which underlies s. 94 of the Public Health Act, 1875.

(1) [1897] 1 Ch. 560. (2) Ibid. 566. (3) Ibid. 567.

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Mr. Wingate-Saul, who, if I may say so, has argued the case for the appellants with great force, has relied throughout upon the view that it is only by breach of an obligation which the owner is legally compellable to perform apart from the Act of 1875 that he can be guilty of a "default" within the meaning of s. 94. That seems to me to be too narrow a view of the meaning of that word, as indeed is shown, among other things, by the juxtaposition thereto of the word "sufferance." The principle here applicable is that which was laid down by Lindley L.J. in the passages to which I have referred. Upon the facts of this case there was not merely some, but abundant, material to justify the court below in coming to the conclusion to which they came.

For these reasons I think that this appeal should be dismissed.

AVORY J. I am of the same opinion. The foundation of the appellants' argument is that they were under no legal obligation to abate the nuisance in question. The case of *Attorney-General* v. *Tod Heatley* (1), which has just been referred to by my Lord, clearly shows, however, that they were under a legal obligation to abate a nuisance which existed upon their own land. In this case it has been found as a fact that the nuisance arose from the default of the appellants, and in my opinion that distinguishes this case from *Thames Conservators* v. *Port Sanitary Authority of Port of London*. (2) When the judgment of Lord Coleridge C.J. in that case is looked at carefully I think it will be found that there is nothing in it which is inconsistent with the decision which we are now giving in this case. At first sight the passage in that judgment to which my Lord has referred, and which has been relied upon so much by Mr. Wingate-Saul, does no doubt appear to be not entirely consistent with the later decision of Lindley L.J. and the other members of the Court in *Attorney-General* v. *Tod Heatley*. (1) It is quite clear, however, that the whole of the arguments,

(1) [1897] 1 Ch. 560. (2) [1894] 1 Q. B. 647.

both for the appellants and for the respondents in the case of the *Thames Conservators* v. *Port Sanitary Authority of Port of London* (1), proceeded upon the ground that the conservators were not owners for the purposes of the Public Health Act. The case was argued for the appellants by Sir Henry James, and he commenced his argument by saying that the appellants were under no statutory liability to remove the nuisance, and then he proceeded to refer to the clauses of their special Act and said: "Those purposes do not include scavenging or sanitary matters . . . . and the power of removal of nuisances is confined to such as may injure the river or obstruct the navigation; this particular nuisance complies with neither of these requirements, though it may be injurious to the neighbourhood." (2) Then he proceeded to point out that: "the appellants have under that Act no funds legally and properly applicable to the removal of nuisances such as the present." Sir Harry Poland in his argument for the respondents said: "The question in the present case is, therefore, whether, within the meaning of that section, the appellants are the owners of the land on which the nuisance in fact exists." The decision of the Court proceeded wholly upon the ground that the appellants were not owners within the meaning of s. 4 of the Public Health (London) Act, 1891, upon whom such an obligation could be cast. Lord Coleridge C.J., at the conclusion of the passage of his judgment which has already been cited, said, referring to the proviso to the section: "The plain meaning of that proviso is that before the liability of the owner or occupier arises, it must be impossible to find the maker of the nuisance, and the nuisance must continue by the act, default, or sufferance of the owner or occupier. Neither of these requisites is satisfied in the present case." That is to say he came to the conclusion that there was no default or sufferance in that case on the part of the conservators of the River Thames. In the present case it is found clearly that there is a default or sufferance in consequence of which the nuisance continues. I therefore

(1) [1894] 1 Q. B. 647. (2) Ibid. 651, 652, 654.

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find no difficulty in reconciling that decision with our decision in the present case. If there were any difficulty in reconciling any of these expressions of Lord Coleridge C.J. with this view, then I would prefer the decision of the Court of Appeal in *Attorney-General* v. *Tod Heatley* (1), which was decided three years later. I observe that in the course of the argument in that case the decision in the *Thames Conservators* v. *Port Sanitary Authority of Port of London* (2) was referred to and relied upon for the respondents, so that in the later case the Court had that decision before them. For these reasons I agree that this appeal should fail.

SANKEY J. I agree, and only desire to say a few words upon the decision in the *Thames Conservators* v. *Port Sanitary Authority of Port of London.* (2) A critical examination of that case will, show that there the only point for decision was whether the appellants were or were not owners of the land for the purposes of s. 4 of the Public Health (London) Act, 1891. If the contentions as set forth in the case are looked at, that clearly appears. The contentions of the respondents, which were only two in number, were as follows: "(*a*) That under s. 50 of the Thames Conservancy Act, 1857, the bed and soil of the foreshore of the creek had vested in the appellants." That was a matter which was not commented upon. "(*b*) That under that section and other sections of the same statute the appellants were 'owners' of the premises on which the nuisance existed within the meaning of s. 141 of the Public Health (London) Act, 1891, and as such liable to abate the nuisance under s. 4 of that Act." (3) The appellants contended "(*a*) That it was not proved that the soil of the creek had ever vested in them. (*b*) That if vested in them it was so in a qualified manner only. . . . . (*d*) That upon the true construction of the sections of the Thames Acts the appellants were impliedly absolved from the liability sought to be imposed upon them. (*e*) That on the true construction of the Thames Acts and of the Public Health (London) Act, 1891, they were not

(1) [1897] 1 Ch. 560. (2) [1894] 1 Q. B. 647. (3) Ibid. 649.

owners of the creek. . . . . " (*f*) That they were in the same position as the Crown had formerly been in and therefore were not liable, and it was only in para. (*g*) that it was contended " That it being clear that the nuisance did not arise by the act, default, or sufferance of the appellants, the respondents were themselves compellable to abate the nuisance." The whole of the contentions for the respondents and the main contentions for the appellants were thus on the question of ownership. As has been pointed out by my brother Avory, the question of ownership was the sole question argued in that case by counsel on both sides. Mr. Poland, for the respondents, said: " The question in the present case is, therefore, whether, within the meaning of that section, the appellants are the owners of the land on which the nuisance in fact exists." Lord Coleridge C.J. at the end of his judgment and in summing it up said: " I come, therefore, to the conclusion in this case that, although the appellants may have been, and no doubt are, for certain purposes occupiers and owners of the soil and foreshore of the Thames, they are not occupiers and owners of the soil and foreshore for the purposes of s. 4." (1) Mathew J., as he then was, very briefly dismissed any other argument on s. 4, and said: " I cannot suppose that the legislature had in view owners of this peculiar kind as distinguished from ordinary owners of property, nor can I believe that, if any such obligation was intended to be imposed by the statute on the conservators, there would not be elaborate provisions to enable them to find the means to carry out what it is suggested they ought to do." (2)

If the learned Lord Chief Justice in that case purported to decide any point other than the point whether the appellants were the owners, I think his remarks on that other point were obiter, and, at any rate, as my brother Avory has said, I should prefer the remarks in the judgment of Lindley L.J. in the more recent case of *Attorney-General* v. *Tod Heatley*. (3)

In my opinion the appeal should be dismissed.

(1) [1894] 1 Q. B. 657. (2) Ibid. 658. (3) [1897] 1 Ch. 560.

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LORD HEWART C.J. I should like to add that these judgments must not be construed as meaning that the appellants are under an obligation in all circumstances to maintain banks which would exclude all floods. The judgments are limited to the facts of the particular case which is before us.

Appeal dismissed.

Solicitors for appellants: *Rider, Heaton, Meredith & Mills, for Ticehurst, McIlquham & Wyatt, Cheltenham.*

Solicitors for respondents: *Church, Adams & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

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Dec. 10, 11.

[IN THE COURT OF APPEAL.]

GRAINGER (INSPECTOR OF TAXES) *v.* MAXWELL.

Revenue—Income Tax—Exchequer Bonds and War Loan Securities—Redemption of Exchequer Bonds before Beginning of Year of Assessment—Interest received in previous Year—Computation of Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., rr.* 1, 2.

The Income Tax Act, 1918, Sch. D, Case III., provides that tax shall be charged in respect of the income described in the rules applicable to that Case, and the rules provide (inter alia): (r. 1.) that the tax shall extend to any interest of money and certain other kinds of interest and profits including "(*f*) interest on any Exchequer bonds issued under the authority of the Treasury . . . . and on any securities issued under the War Loan Acts . . . . in cases where such interest is paid without deduction of tax"; and (r. 2.) that the tax shall be computed on the full amount of the profits or income arising within the year preceding the year of assessment.

A taxpayer was assessed to income tax for the year ending April 5, 1921, under the above provisions in respect of untaxed interest on certain Exchequer bonds, certain war loan securities, and certain money on deposit. She had held and received interest from each of these items of property in the preceding year, but in that year the Exchequer bonds were redeemed and no interest was thereafter received therefrom, and in the year of assessment she held and received interest from the other items of property only:—

Held, that, as the taxpayer had ceased to hold or to receive interest from the Exchequer bonds before the beginning of the year of assessment, she could not in that year be assessed to income tax in respect thereof,

notwithstanding that in holding and receiving interest on the War Loan securities in that year she was still holding and receiving interest on part of the holding of Exchequer bonds and War Loan securities taken together, which she had held and received interest on in the preceding year; and consequently that the amount of the assessment should be reduced accordingly.

Reasoning of *Brown* v. *National Provident Institution* [1921] 2 A. C. 222 and *Whelan* v. *Henning* [1925] 1 K. B. 387 (since affirmed in H.L. [1926] A. C. 293) applied.

Decision of Rowlatt J. [1925] 2 K. B. 376 affirmed.

APPEAL from a decision of Rowlatt J. (1) on a case stated by the Commissioners for the General Purposes of the Income Tax Acts.

In the year ended April 5, 1920, the Hon. Mrs. H. Maxwell, deceased, held and received income from property of the following descriptions—namely, certain 6 per cent. Exchequer bonds issued under the authority of the Treasury during the war; certain securities issued under the War Loan Acts, 1914 to 1917—namely, 5 per cent. War Stock 1929–1947, and 5 per cent. National War Bonds, 1928; and certain money on deposit. The Exchequer bonds were redeemed in February, 1920, and no interest was thereafter received therefrom, but Mrs. Maxwell continued to hold and was in receipt of income from the securities issued under the War Loan Acts during the year ended April 5, 1921.

An assessment for the year ended April 5, 1921, was made upon Mrs. Maxwell under the Income Tax Act, 1918, Sch. D, Case III., in the sum of 1170*l.* 10*s.* in respect of untaxed interest on the above mentioned items of property. It was admitted that the assessment consisted of two parts—namely, 716*l.* 10*s.* interest on the Exchequer bonds and War Loan securities, and 454*l.* interest on money on deposit, being the respective amounts received in the year ended April 5, 1920. It further appeared that the item of 716*l.* 10*s.* included a sum of 300*l.* interest on Exchequer bonds, which interest ceased on February 2, 1920.

On February 3, 1922, Mrs. Maxwell appealed against the assessment to the Commissioners.

It was contended on behalf of Mrs. Maxwell that she could

(1) [1925] 2 K. B. 376.

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not be liable in the income tax year 1920–21 in respect of interest on the Exchequer bonds, as the source of income had ceased before the beginning of that income tax year; and, further, that neither the receipt of interest from the War Loan securities nor the holding of those securities in the year of assessment made her liable to assessment upon the Exchequer bond interest.

It was contended by the inspector of taxes that the contentions on behalf of Mrs. Maxwell were not well founded, and that the assessment was rightly made in 1170*l.* 10*s.*, being the full amount of interest received from the said items of property within the previous year.

The Commissioners, being of opinion that, as the interest from the Exchequer bonds had ceased before the beginning of the year of assessment and the source of income had ceased, the holder could not be assessed on the sum representing that interest, reduced the assessment to 870*l.* 10*s.*

The inspector of taxes required the Commissioners to state the present case. Mrs. Maxwell having died, the proceedings on her part were continued by her executors the present respondents.

Rowlatt J. affirmed the decision of the Commissioners.

The Crown appealed. The appeal was heard on December 10, 11, 1925.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the Crown. The general rule is that under Sch. D income tax is computed according to the interest in the preceding year. In this case Exchequer bonds, War Loan and National War Bonds were held in the basis year, and the only question is whether there was an identity of source in that year; in other words, do the War Loan and National War Bonds attract these Exchequer bonds for income tax?

[POLLOCK M.R. Is not this like *Brown* v. *National Provident Institution* (1)? In the basis year there must be a holding, and in the year of assessment there must be a source.]

The only point in *Brown's* case (1) which is material in the

(1) [1921] 2 A. C. 222.

present case is that dealing with profits on discounts. The real question is whether there is an identity of sources.

This case comes within Sch. D, r. 1 (*a*), (*b*); r. 2, Case III.; and r. 1 (*a*), (*b*) and (*f*) of the rules applicable to Case III. All interest under Case III. is intended to be taxed under one head. If the doctrine of source is to be applied, then each separate bond would have to be regarded as a source.

By s. 58, sub-s. 1, of the Finance Act, 1916, the power of the Treasury to borrow on Exchequer bonds under s. 1, sub-s. 1, of the War Loan Act, 1915, was extended, and s. 64 of the same Act provided that the interest on such bonds might be paid without deduction of income tax, but that such interest should be accounted for and charged to income tax under Case III. of Sch. D, and that section was applied to interest on War Loan Stock by s. 18, sub-s. 1, of the Finance Act, 1917, which thereby was brought within Case III. of Sch. D. Under r. 1 of the rules applicable to Case III. all interest of money is to be treated as one so far as tax is not deducted at the source and the person making the return makes it in one lump sum and there is one assessment to tax.

Further, the different sources are expressed in (*a*) to (*f*) of r. 1 of the Rules applicable to Case III., and it was intended that income from all or any of those sources should be all lumped together in one return. Since *Brown's* case (1) was decided the law has been altered by s. 17 of the Finance Act, 1922.

Latter K.C. and *Cyril King* for the respondents. The decision of Rowlatt J. was right. The interest on the Exchequer bonds having ceased before the commencement of the year of assessment and the source of income having also ceased Mrs. Maxwell could not be assessed on the sum representing that interest. In *Brown's* case (2) the reasons given by the Commissioners in their decision were, that the rule in Case III. of Sch. D only provided a measure of liability in respect of profits from a source existing in the year of assessment; that the receipt during the year of assessment of interest of money, not being annual interest, did not

(1) [1921] 2 A. C. 222. (2) [1920] 3 K. B. 35, 40.

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justify the maintenance of an assessment on the amount of the profits arising from discounts on Treasury Bills in the preceding year where no such discounts were received or bills held or dealt in during the year of assessment; and that all the distinct and separate descriptions of profits comprised in Case III. should be treated as separate sources of income and separate subjects of assessment. Those reasons, it is submitted, were correct, and apply to the present case. Each of the items mentioned in clause (*f*) of r. 1 must, it is submitted, be treated as a separate source of income and taxable accordingly. It is not suggested that the decision itself in *Whelan* v. *Henning* (1) covers the present case, but the reasoning, it is submitted, is applicable. (2)

[POLLOCK M.R. In *Tennant* v. *Smith* (3) Lord Macnaghten said: "The duty under Schedules D and E is payable on the 'annual amount.' It is a tax on income in the proper sense of the word. It is a tax on 'what comes in'—on actual receipts."]

[They also referred to *Thomson* v. *Bensted* (4) and Craies on Statute Law, 3rd ed., p. 194.]

R. P. Hills replied.

POLLOCK M.R. This is an appeal from a decision of Rowlatt J., affirming the decision of the Commissioners, by which they reduced the assessment upon the respondents, as representing the estate of Mrs. Maxwell deceased, from 1170*l.* to 870*l.*, that is to say, by 300*l.*

It appears from the facts as found in the case stated that in this estate there were three items of Government securities which bore income: Exchequer bonds, the income of which in the year in question was 300*l.*, National War Bonds and War Loan Stock, which together produced in the same year an income of 870*l.*, making a total of 1170*l.* as the income from those three several Government securities. The year of charge is 1920–21. The bonds were redeemed on February 2, 1920, and after that date, therefore, they ceased to exist, and

(1) [1925] 1 K. B. 387.
(2) Ibid. 395.
(3) [1892] A. C. 150, 164.
(4) (1918) 7 Tax Cas. 137.

there was no income received by her from them. The year of charge began on April 6, 1920, and ran to April 5, 1921, so that in respect of this particular security there was no income received during the year of charge.

It is said that although there was no income received during the year of charge, yet by reason of the method by which the tax is to be ascertained in respect of profits of uncertain value, and of other income described in the rules applicable to Case III. of Sch. D, there is a liability to pay tax in respect of the 300*l.* which had been paid to the estate up to and including the previous year.

With regard to Case III., by r. 1 (*f*) of the rules applicable to that Case, it is provided that the tax shall extend to "interest on any Exchequer bonds issued under the authority of the Treasury during the continuance of the present war and a period of six months thereafter and on any securities issued under the War Loan Acts, 1914 to 1917, or any Act amending those Acts, in cases where such interest is paid without deduction of tax," and by r. 2 that "The tax shall be computed in each case on the full amount arising within the year ending on that day of the year preceding the year of assessment on which the accounts are usually made up, or on the fifth day of April preceding the year of assessment, and shall be paid on the actual amount as aforesaid without any deduction."

Trying to put that in rather simpler language, it says this: that within a certain number of items which fall to be taxed under Case III. of Sch. D, and to which rr. 1 and 2 of Case III. are applicable, there you have to measure the tax that is to be paid by what has been received in the year preceding the year of assessment, without any deduction, and to see what was the sum received in that previous year, and on that sum you are to pay the tax in respect of the sum on which you are assessed in the year of charge. The taxpayer retorts: "Why should I pay tax on a sum of 300*l.* which I did not receive at all in the year of charge? It is true that in a previous year I received 300*l.*, but you are assessing me for my income tax for the year 1920–21, and in that year I did

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not receive 300*l.* or any sum in respect of the Exchequer bonds, for they were redeemed and done with before the year of assessment began." It is obvious that it is a very startling proposition that by following a system whereby you are to compute the tax, if the taxpayer is liable, you render him liable to tax in respect of something which he has not got at all in the year of charge.

Various difficulties are suggested if we follow the judgment delivered by Rowlatt J. It is unnecessary to deal with those difficulties. It is the duty of this Court to determine, according to the construction of the Income Tax Acts, whether or not this estate is liable in respect of this sum claimed.

Many of these cases run on very narrow lines. It is not easy, in income tax cases, to lay down a broad principle : for, after all, an endeavour is made in the Income Tax Acts to deal with the manifold activities of all classes of persons in the State, which are complex and difficult to reach and define.

The Commissioners were of opinion, as the Case says, that as the interest from the Exchequer bonds had ceased before the beginning of the year of assessment, the source of income had ceased, and Mrs. Maxwell could not be assessed on the same.

It is said by the Crown, that it is untrue to say that the source of income had ceased, because as a matter of fact if you treat the source of this income as being these Government securities (I use a comprehensive phrase) which are named in the rule, even if she had not got Exchequer bonds she had got securities issued under the War Loan Acts, 1914 to 1917, and those as well as the Exchequer bonds are all comprised in cl. (*f*) of r. 1 of the rules applicable to Case III., and, therefore, there was a source of income all belonging to cl. (*f*), and if she had got, therefore, a source of income, then you must compute the tax to which she is liable under r. 2 of the rules applicable to that case, which I have already read.

I think it is important to state that we are dealing with this case upon the facts found by the Commissioners. It is the duty of the Commissioners to find the facts, and when they

have done so, if there is evidence on which they could act, we have no right to disturb those findings of fact. We have to see whether they have correctly directed themselves on points of law.

When such a curious result is revealed as is contended for by the Crown in this case, it is, I think, important to go back to the primary principles of the income tax. Sect. 1 of the Act of 1918, which applies to the present case, provides: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains"—those are the material words—"respectively described or comprised in the Schedules marked A, B, C, D and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules."

For the year of assessment in question there was an Act in force which enacted what income tax should be charged. Therefore s. 1 of the Act of 1918 was brought into operation; and therefore there was a tax to be charged at the rate provided for by the annual Act in respect of the profits or gains which are comprised in the Schedule.

Sch. D deals with the method of carrying into effect that charge imposed by s. 1. Sch. D, r. 1, provides: "Tax under this Schedule shall be charged in respect of . . . . (*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax." It brings, therefore, into Sch. D the annual profits or gains which are received from these Government securities. More than that, r. 2 of Sch. D provides they are to be taxed in various ways, but by sections of the Act to which our attention has been called it is provided that these particular Government securities shall fall, for the purpose of tax, within Case III. of Sch. D. I am quite prepared, for the purposes of my judgment, to accept the argument of Mr. Hills, that the Exchequer bonds were issued under circumstances which would make them to be issued under the War Loan Acts of 1914 to 1917. That may be so; but they are specifically and specially mentioned

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independently of the securities so issued in cl. (*f*) of r. 1 of the rules applicable to Case III.

Having got so far we have to see in more detail how the income tax under Sch. D, and in particular under Case III., is to be collected. The Schedule provides that certain rules are to be applicable to Case III. The first of those rules provides : " The tax shall extend to . . . . (*f*) interest on any Exchequer bonds issued under the authority of the Treasury," and so on. You cannot suggest, after that rule, that the interest on Exchequer bonds is not part of the annual profits or gains which are brought within the ambit of Sch. D by cl. (*b*) of r. 1 of Sch. D. But what is it on which the charge falls ? It falls upon the profits or gains, and if there are no profits or gains it does not fall upon them. It appears to me that you cannot say that under cl. (*f*) or under any of the other rules you are to group together things which would fall within the same system laid down under r. 1 of the rules applicable to Case III., and say that because you have got some gains that belong to that particular category, you are to compute the tax as if you had received an income which you have never received at all.

In my judgment the case is really concluded by two cases which have been decided, one in the House of Lords and the other in this Court. It has been held, or it has been pointed out, that r. 2 of the rules applicable to Case III. is a rule for the purpose of computation—namely, what is the amount of tax payable, assuming that there be some tax that is payable ? It is not a charging section.

In *Brown* v. *National Provident Institution* (1) the point that arose was whether or not there can be any tax charged, computed under the corresponding rule under the Act of 1842, where there had not been any profits or gains in the year of assessment. It was held that inasmuch as there were no profits, there was not what is called a source of income or really there was no income which fell to be taxed, and that although you might compute the tax if it had been payable by reference to the preceding year, yet, as there

(1) [1921] 2 A. C. 222.

was no actual receipt of taxable income during the year, it did not matter what the standard or measure was, because there was not any tax assessable at all.

Lord Haldane, who gives the leading judgment, seems to me to make it quite plain that unless there is some sum received which falls to be taxed you cannot have the tax computed, even though the rule would compute the measure on which you are to pay the tax by reference to preceding years. He says (1): "The language of the rule measures the amount in respect of which the assessment is to be made by that of the profits and gains within the preceding year. But this does not appear to be conclusive. For the principle of retrospective measurement is one which is applied elsewhere in the Acts, limited, however, to cases in which the source of income continues to exist in the year of assessment. It is the profits and gains of a continuing business that are in such cases the subject of assessment." Again he says (2): "It seems to me that the true meaning of the words the Legislature has used is that the tax is intended as matter of basic principle to be on profits and gains forming income in the year of assessment, though not measured by the income of that year."

I leave the present Lord Chancellor's speech, because he disagreed with the majority. Lord Atkinson says (3): "It" —that is the argument presented by the Crown—"ignores the vital fact that income tax is primarily a tax upon a real, not an imaginary, income accruing to the taxpayer during the year of assessment." Then, after stating (4) that the tax was divided into five parts, having relation to the particular sources from which the income was derived, he adds (5): "It was a tax assessed, levied, and collected yearly on the profits and gains arising and accruing during the year in which it was collected from one or more of the sources named. If this be so, as in my opinion it clearly is, it necessarily follows that if in the year of assessment a source of income

(1) [1921] 2 A. C. 235.
(2) Ibid. 236.
(3) Ibid. 243.
(4) Ibid. 245.
(5) Ibid. 246.

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should dry up and no income accrue, then no tax could be levied or collected in respect of a non-existing income."

I will just refer to one more passage in which Lord Sumner says (1): "These rules, it must be admitted, handle prepositions a little freely, for the first rule computes the duty 'at' the full amount earned, not 'on' it, but one such slip is enough; to be paid 'on' the actual amount cannot be amended into to be paid 'notwithstanding' the actual amount."

It appears to me that from that case it is abundantly plain that you have to take as the principle of a charge to income tax, that there has been some income received. Quite recently we had before this Court the case of *Whelan* v. *Henning* (2) —and it is binding upon us. We there considered the effect of *Brown* v. *National Provident Institution* (3), and held that the taxation under the Income Tax Acts was on "income" and not on "sources of income," and that the respondent's liability to pay depended not upon the possession of shares in the year of assessment, but upon the receipt of some profit from them in that year, that is, upon the actual receipt of income. Warrington L.J. there gives a summary of what he considers to be the underlying principles which form the basis of the judgments in *Brown's* case (3), and with that summary I agree.

If that be the true test, it seems to me to be of no use to begin at the wrong end and to say that if you take the detail end, that is to say, Sch. D, Case III., and the rules applicable to it, you will find in those rules something which will enable you to compute a tax by reason of what has been received in the preceding year. What you have to do is to go to the beginning of the Act and see whether there is some profit or gain which is to be charged, and if there is no such profit or gain, then it is idle to go on to ascertain how that profit or gain, if it had been received, would have been charged in the hypothetical case of its receipt.

For these reasons it appears to me that this case is concluded by the reasoning of *Brown* v. *National Provident Institution* (3) and *Whelan* v. *Henning*. (2)

(1) [1921] 2 A. C. 259.
(2) [1925] 1 K. B. 387. (since affirmed in H. L. [1926] A. C. 293)
(3) [1921] 2 A. C. 222.

I do not see how it is possible for us to treat these different securities as forming one item, and one item only, so as to bring them into charge in respect of and measured by the income received from them in the previous year. I do not think it is necessary for us to say or to decide what is meant by separate sources of income or whether we are to treat all those included under cl. (*f*) of r. 1 of the rules applicable to Case III., or under cl. (*b*), r. 1 of Sch. D, as separate sources of income, the position of which may involve a computation under r. 2 of Case III. It appears to me that the probability is that the solution of such problems as can be suggested as likely to arise may lie in the fact that the Commissioners have to find the facts in each case.

I agree with the reasons given by Rowlatt J. in his judgment, and for the reasons I have ventured to add, I think that this appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The year of assessment with which we have to deal is the year from April 6, 1920, to April 5, 1921. In the year preceding that year of assessment the taxpayer had been possessed of Exchequer bonds producing an income in that year of 300*l*. In February, 1920, before the commencement of the year of assessment, those bonds had been redeemed. In the year of assessment, therefore, she possessed no Exchequer bonds and she received no income from Exchequer bonds. Consequently if the principles adopted by the House of Lords in *Brown* v. *National Provident Institution* (1) are applicable to this case, the taxpayer was not liable in the year of assessment to be assessed to income tax in respect of the Exchequer bonds, inasmuch as in respect of those bonds no income was received or receivable by her during that year.

But it is said that the decision in *Brown's* case (1) is not applicable to the present case, and for this reason. The Crown's contention in the present case is that, as a matter of law, all the items enumerated in cl. (*f*) of r. 1 of the rules applicable to Case III. of Sch. D are to be treated as one source

(1) [1921] 2 A. C. 222.

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of income, and that inasmuch as the taxpayer in the year of assessment was possessed of securities other than the Exchequer bonds issued under the War Loan Acts, 1914 to 1917, she is liable to be assessed to income tax and to have the tax computed not only on the amount of the income in the previous years on the securities issued under the War Loan Acts, 1914 to 1917, but to have included for the purposes of computation the interest on the Exchequer bonds received by her in previous years, though not received in the year of assessment.

That contention on the part of the Crown has been rejected by the Commissioners and by the learned judge, Rowlatt J. In my opinion, it has been rightly rejected. I do not propose to say anything in this judgment that is not necessary for the purpose of deciding the case which is before us. There are no doubt many problems other than the one with which we have to deal to-day, which may be raised upon the true construction of the provisions of the Income Tax Act. They will have to be solved when they arise. All I propose to deal with is the contention on the part of the Crown that at least the items of property enumerated in each of the several clauses of r. 1 of the rules applicable to Case III. ought to be treated as one source of income. The Crown, I think, seeing the weakness of their logical position if they confined their contention to the items enumerated in these several clauses, are prepared to extend their contention so as to bring all the items covered by Case III. into one group as one source of income; but I will deal only with the contention which is really material to the present case.

In my opinion, whatever may be reasonable in regard to such a matter, I can find nothing in the Act which enables me to come to the conclusion that the Legislature intended that the several items comprised in each of these several sub-divisions of cl. (*f*) of r. 1 of the rules applicable to Case III. should be treated as one source of income. This is to be borne in mind in construing all this part of the provisions contained in the Income Tax Act, 1918. As we know, profits are dealt with under several Schedules, A, B, C, D and E. Taking Sch. D for the moment, which is the only material

one, the provision with regard to the Cases, as they are called, is this (r. 2): "Tax under this Schedule shall be charged under the following cases respectively." Now it has already been pointed out that this is not a charging section. The tax has already been charged by a previous provision of the Act. All that is provided for is the regulation of the mode in which that charge shall be carried out. It is to be charged under, amongst other things, the following Cases. One of those Cases is Case III.: "Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case." Then r. 1 of rules applicable to that case, when you come to it, merely provides that the tax shall extend to—and then a number of items of income or profits are mentioned under six different heads: (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*), and that is all that it says.

Now after the decision in *Brown* v. *National Provident Institution* (1), we have to ascertain whether there was a source of income which produced income in the year preceding the year of assessment, but did not produce income during the year of assessment. We find such a source. We find Exchequer bonds, which are unquestionably in popular parlance a source of income. We find that in the important year they produced no income at all, and therefore according to *Brown's* case (1) the taxpayer is not liable to tax in respect of the income—I was going to say the income derived from them, but she has derived no income at all; but she is not liable to any income tax in respect of her previous possession of those Exchequer bonds. I can see nothing whatever, nor has our attention really been called to anything, which indicates that each of these sub-divisions is to be treated as one source of income—certainly not because they are sub-divided; the question would be just the same if the rule had run straight on. The only provision which could possibly lead to such conclusion is r. 2 of the rules applicable to Case III.: "The tax shall be computed in each case on the full amount arising within the year ending on that day of the year preceding the year of assessment on which the

(1) [1921] 2 A. C. 222.

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accounts are usually made up, or on the 5th day of April preceding the year of assessment." But, as has already been pointed out, that is not a charging section at all; it is merely a rule regulating the way in which the sum in arithmetic shall be done. For the purpose of the income tax in the year of assessment, in order to make your calculation as to what is the amount of so many shillings or so many pence in the pound, which is the income tax for the year, you are to take as the basis of your calculation the income from a particular source in the year before. That is all it is; and when it says "in each case" I think it only means in the case of each of the sources of income with which you have to deal; it does not mean that the sources of income are to be grouped together in the way the Crown has contended.

I think the decision of the Commissioners and of the learned judge is perfectly right, and the appeal ought to be dismissed.

SARGANT L.J. I agree. It appears to me that the case is put in a nutshell by Rowlatt J. when he said (1) that the question was: "What is the unit of measurement when one comes to the consideration of the profits to be measured in the year of assessment?"

Sect. 1 of the Income Tax Act, 1918, provides: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains," and so on. Therefore, prima facie, the income tax is charged upon a very large number of separate units or items of income which are classed under categories and sub-categories, under the letters A, B, C, D and under sub-divisions of those categories; and I cannot find in s. 1 anything which points to any particular group or aggregation of those separate items or units into larger items or units. In that state of things, we find that when you come to Sch. D and the rules applicable to Case III., there are a number of sub-categories, amongst which you find (r. 1 (*f*)): "Interest on any Exchequer bonds . . . . and on any securities issued under the War Loan Acts, 1914 to 1917. . . . ."

(1) [1925] 2 K. B. 376, 379.

Now here in the year preceding the year of assessment, income had been received in respect both of the Exchequer bonds and of other securities under the War Loan Acts. In the year of assessment the income of the Exchequer bonds had dropped out; there was no income received. That being so, turning to r. 2, and having regard to *Brown's* case (1), the question is whether the item or unit of income which was to be looked at was the income derived from the Exchequer bonds and the War Loan as one single unit or item, or whether you were to look at the income derived from the Exchequer bonds as a separate unit or item of income from the income derived from the War Loan securities. If the former was the case, then the lady was chargeable to an amount measured by the whole income which she had received from the Exchequer bonds and the War Loan securities as one aggregated unit or item. If the latter was the case, then she was only chargeable in respect of the income derived from the War Loan securities in the previous year, because the other single item of the Exchequer bonds had dropped out and no longer had to be taken into account.

I can see no reason for supposing that the Commissioners did not come to a perfectly right conclusion in holding that the income from the Exchequer bonds was a separate item of income, a separate unit, and in thinking that there was no reason for aggregating with that item of income the items of income from the other War Loan securities, so as to form a larger statutory item of income derived from that aggregation.

It appears to me that the learned judge was quite right in the test that he applied, and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Hunters.*

(1) [1921] 2 A. C. 222.

W. I. C.

1925
Dec. 6, 7, 18.

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[1922. R. 1013.]

Landlord and Tenant—Lease—Tenant holding over after Expiration of Lease—New quarterly Tenancy upon same Terms as Lease—Agreement in Writing signed only by Lessor — Assignment of Reversion — Right of Assignee to sue for Breaches of Covenant in Lease — Conveyancing Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 10.

In September, 1895, a lease was granted of certain premises for twenty-one years, expiring in March, 1917. The lease contained full repairing and painting covenants, including a covenant by the lessee that he would at the expiration of the lease deliver up the premises in good and substantial repair. In 1900 the lease was assigned to the defendant. In 1910 the lessors granted a building lease to G. for ninety-nine years, subject to, but with the benefit of, the lease of September, 1895. In 1911 G. deposited his building lease with N. by way of equitable mortgage. In June, 1915, G. was adjudicated bankrupt. Shortly afterwards N. entered into possession of the mortgaged premises under the powers contained in his mortgage. In February, 1917, N. agreed with the defendant verbally that he should hold over after the expiration of the lease on the terms of the old lease subject to an increased rent, and accordingly the defendant remained in possession. In July, 1917, the trustee in bankruptcy of G. assigned the ninety-nine years building lease to N. In September, 1918, N. made another verbal agreement with the defendant, that he should remain at the premises as tenant from September 29, 1918, to the Declaration of Peace, but at an increased rent. This verbal agreement was confirmed in writing by a letter dated September 7, 1918, signed only by N.'s agent, the defendant not signing any document. On July 22, 1900, N. assigned the building lease to the plaintiff, who at the same time acquired the freehold of the premises. The defendant in November, 1920, gave up possession of the premises, as the plaintiff alleged, in a serious state of dilapidation. The plaintiff brought an action to recover damages from the defendant for breaches of the repairing and painting covenants :—

Held, that the letter of September 7, 1918, notwithstanding that it was signed only by the landlord's agent, constituted a sufficient agreement in writing within s. 10 of the Conveyancing Act, 1881, to entitle the plaintiff to maintain the action for breach of the covenant to deliver up the premises in good and substantial repair.

Action tried before McCardie J.

The action was brought by the plaintiff to recover damages from the defendant for breaches of repairing and painting obligations.

The following statement of facts is taken from the judgment.

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By a deed of September, 1895, Mrs. Edwards and others leased to one Gosling certain premises known as 5 Warwick Street, Regent Street, for twenty-one years from March 25, 1896, at a rent of 130*l.* per year. The lease contained full repairing and painting covenants, including a covenant by the lessee that he would at the expiration or sooner determination of the lease deliver up the premises and also all landlord's fixtures "in such good and substantial repair as should be consistent with the due performance of the several covenants hereinbefore contained."

In 1900 Gosling duly assigned the lease to the present defendant, Purcell. The lease, it will be observed, would expire in March, 1917. Meanwhile—namely, in July, 1910—the lessors of the deed of September, 1895, granted a building lease to one Grace for ninety-nine years as from March 25, 1910, subject to, but with the benefit of, the lease of September, 1895. Thus Grace became the reversioner with respect to the lease of September, 1895. In 1911 Grace deposited his building lease with one Nicholls by way of equitable mortgage to secure an advance. On June 12, 1915, Grace was adjudicated bankrupt, and on June 17, 1915, one Bourner was appointed trustee. Hence the interest of Grace passed to Bourner under the Bankruptcy Act, subject, of course, to the interest of Nicholls as mortgagee. Soon after June 17 Nicholls, by virtue of his powers under his mortgage, entered into possession of the mortgaged premises. So matters stood in the first month of 1917.

In February, 1917, Nicholls, acting through Grace as his agent, agreed with the defendant verbally that the defendant should hold over after the expiration of the lease at the rent of 275*l.* per annum as a quarterly tenant on the terms of the old lease, apart from the change in rent. This verbal agreement was confirmed in writing by two letters dated February 2, 1917, and February 3, 1917, signed by Grace as the duly authorized agent of Nicholls. The defendant himself, however, did not in fact sign any letter in confirmation of the agreement. On March 25, 1917, the lease of September 10, 1895, expired. The defendant, however, remained in possession under the

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terms of the two letters of February 2, 1917, and February 3, 1917, and he paid rent to Nicholls at the higher rate which had been agreed.

In July, 1917, Bourner, the trustee in bankruptcy of Grace, formally assigned the ninety-nine years building lease of July, 1910, to Nicholls, who had previously been the equitable owner only of that lease. He (Bourner) did not in any way purport to assign the benefits of the expired lease of September, 1895. In May, 1918, Bourner obtained his release as trustee in the bankruptcy of Grace. The effect of this release must be decided (as I will indicate later) by s. 93 of the Bankruptcy Act, 1914.

In June, 1918, Nicholls, who had then, as I have shown, become entitled to the property subject to the quarterly tenancy of the defendant, gave defendant notice to quit on September 29, 1918, pursuant to the terms shown in the two letters of February 2 and February 3, 1917. This notice however was not acted on, because in September, 1918, another agreement was verbally made between Nicholls and the defendant—namely, that the defendant should remain on at the premises as tenant from September 29, 1918, to the Declaration of Peace in the then war at the rent of 325*l.* per year. This verbal agreement was confirmed in writing by the following letter signed by Grace as the authorized agent of Nicholls:—

"Sep. 7, 1918.

"Dear Sir,

With reference to our conversation to-day the further rent of the premises will be 50*l.* making 325*l.* per annum as from September 29 next—this tenancy to continue until the Declaration of Peace and probably for three months after it, provided my lessor makes no objection.

Yours faithfully,

To Mr. W. Purcell, Warwick Street, W.

ALFRED GRACE (on behalf of C. T. Nicholls)."

On July 22, 1920, Nicholls assigned the building lease of July, 1910, to the plaintiff in this action, Mr. Rye. At the same time, July 22, 1920, Mr. Rye acquired the full freehold

to the premises. Although the defendant should have given up possession at the Declaration of Peace in January, 1920, he did not do so, but stayed on till November, 1920, when he yielded up possession, and left the premises (as the plaintiff asserts) in a serious state of dilapidation. He had always paid quarter by quarter the rent which fell due.

The last document I need mention is a deed dated October 3, 1921, whereby the said Bourner (the trustee in bankruptcy of the said Grace) expressly assigned to the present plaintiff all the benefits of the covenants and conditions of the lease of September 10, 1895, and all rights of action for the non-observance of the covenants in that lease, and also the full rights of the tenancy created in February, 1917, together with all causes of action thereunder against the defendant, and the said Nicholls assigned (in substance) to the plaintiff all the benefit of the covenants and conditions of the verbal tenancies of the defendant with respect to 5 Warwick Street respectively created in the month of February, 1917, and the month of September, 1918, together with all causes of action, etc. Written notice of the deed of October 3, 1921, was duly given to the defendant. The present writ was issued on May 3, 1922.

Greaves-Lord K.C. and *Warwick Draper* for plaintiff.

Rayner Goddard K.C. and *Willoughby Williams* for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1925. Dec. 18. McCARDIE J. read the following judgment. This case touches the law of landlord and tenant. On the points for my present decision the facts are not in dispute. The documents, though numerous and intricate, can be briefly summarized.

The action is brought to recover damages for breach of repairing and painting obligations. [His Lordship stated the facts set out above and continued :] Upon the above facts

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and documents the defendant submits that the present plaintiff is not entitled to maintain this action against him. The plaintiff has not asked for any amendment by the addition of parties, but I have allowed minor amendments of paras. 8 and 10 in the necessarily long and complicated statement of claim, so as to raise the points actually argued before me.

The first point raised by counsel for the defendant arose upon the deed of October 3, 1921, whereby Bourner (who had been the trustee of Grace) purported to assign the benefit, etc., of the covenants in the deed of September, 1895, together with the causes of action arising thereon, and together also with the benefits of the tenancy of the defendant created (as I have indicated) in February, 1917. In my view this assignment by Bourner is not void on the ground of what is called champerty or maintenance : see *Ellis* v. *Torrington*. (1) But in my opinion the further point taken for the defendant is a good one—namely, that Bourner had no right or power on October 3, 1921, to assign anything at all. He had obtained his release on May 30, 1918. In my view the effect of that release was clear. By s. 93, sub-s. 5, of the Bankruptcy Act, 1914, it is provided that "where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee." It follows that Bourner had no power of assignment. His rights had passed from him, and apparently they became vested ipso facto by his release in the official receiver : see s. 53, sub-s. 3, of the Bankruptcy Act, 1914.

I now turn to the second point. It will be noted that the first agreement between the defendant and Nicholls for continuing the tenancy was in February, 1917. It will also be noted that the later agreement between the defendant and Nicholls for continuing the tenancy was in September, 1918. It will suffice for the plaintiff's purpose if he can establish a right to sue upon the later agreement of September, 1918, for if that can be done the earlier agreement is of but little

(1) [1920] 1 K. B. 399.

importance. I will therefore deal with that later agreement of September, 1918, which the plaintiff submits carried with it an obligation by the defendant to deliver up the premises (No. 5 Warwick Street) at the expiration of the tenancy in such good and substantial repair as should be consistent with the due performance of the repairing and other covenants of the lease. Now it was not until July 22, 1920, that the present plaintiff became the reversioner of the premises, and the defendant became his tenant. It was about five months after July, 1920, that the defendant gave up possession. The question is whether upon the law as it stands the plaintiff can sue the defendant for breach of the tenancy agreement of September, 1918. The plaintiff cannot, of course, rely on 32 Hen. 8, c. 34, for that statute only applies to leases under seal: see the decisions collected in Mr. Redman's excellent treatise on Landlord and Tenant, 8th ed., pp. 702 et seq. But the substantial point here is whether the plaintiff is able to maintain the action by virtue of s. 10 of the Conveyancing Act, 1881. (1) That section says (so far as it is now material): "Rent reserved by a lease, and the benefit of every covenant or provision therein contained . . . . shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease. . . . ." The section has been liberally interpreted, and modern views have given it a wide and useful effect. It was decided in *Rickett* v. *Green* (2) that the word "lease" in the section included an agreement for a lease. At a later date a further and important point was decided in *Cole* v. *Kelly* (3), which bears directly on the matters now before me. It will be observed that the letter of September 7, 1918, signed by the agent of Nicholls, does not expressly provide that the terms of the old lease shall govern the new tenancy. A like state of things existed on the letters in *Cole* v. *Kelly*. (3) The Court of Appeal however held that the terms of the old lease were by necessary implication

(1) This section has been repealed and re-enacted in s. 141 of the Law of Property Act, 1925.

(2) [1910] 1 K. B. 253.

(3) [1920] 2 K. B. 106.

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incorporated into the new bargain made by the letters passing between the parties there. So here I hold, and indeed it was admitted by counsel for the defendant, that the letter of September 7, 1918, must be taken, by reason of *Cole* v. *Kelly* (1), to incorporate such terms of the lease of September, 1895, as were applicable to the continued tenancy. This being so, the point taken by the able counsel for the defendant was that s. 10 of the Conveyancing Act, 1881, had no application here, because the plaintiff could not show that there had been an agreement in writing signed not only by the former landlord but also by the tenant. Now in the present case there was no document, as I have said, signed by the tenant—i.e., the defendant—for the letter of September 7, 1918, was signed by the landlord's agent only. Sect. 10 of the Conveyancing Act, 1881, does not by its very words state that such agreement in writing signed by each must have existed ere the section be applicable. The words of the section are simply: "Rent reserved by a lease." Those words, however, have been interpreted by the Court of Appeal. In *Blane* v. *Francis* (2) it was held that s. 10 did not apply if the agreement was not in writing; a parol agreement would not suffice for s. 10. In that case neither landlord nor tenant had signed any document at all—the bargain was merely parol—and hence the Court of Appeal held that the assignee of the reversion was not entitled to sue the tenant for breaches of the covenant to repair contained in the expired lease.

There now arises a new point. It is settled, as I have said, by *Blane* v. *Francis* (2) that s. 10 does not apply where the agreement is merely verbal. It is also settled that s. 10 does apply where both parties sign a document or letters which embody the bargain for continuing the tenancy: see *Cole* v. *Kelly*. (1) The question here is: Does s. 10 of the Conveyancing Act, 1881, apply where the document showing the terms of the tenancy is signed by the landlord only? Is there in such a case an "agreement in writing" as required by the cited decisions so as to bring the case within s. 10 of

(1) [1920] 2 K. B. 106. (2) [1917] 1 K. B. 252.

the Conveyancing Act, 1881 ? The plaintiff says, Yes. The defendant says, No.

I have read through the three more relevant decisions to see what light they throw on the matter. In *Wedd* v. *Porter* (1) there is but a passage by Swinfen Eady L.J. in which he says (2) : " The plaintiff meets this objection by relying upon s. 10 of the Conveyancing Act, 1881, and urges that now a writing not under seal will be sufficient. But this question does not really arise, as there is no writing, and no case for specific performance, and nothing to show that any instrument at all was ever intended to be executed or signed by the parties." That is all. In *Wedd* v. *Porter* (1), as Swinfen Eady L.J. pointed out, there was no writing at all.

In *Blane* v. *Francis* (3) also I have already indicated that there was no writing at all signed by either landlord or tenant. Swinfen Eady L.J. says (4) : " I fail to see any ground upon which either the landlord or the tenant could compel the other to execute a lease putting those terms into writing. Neither party had agreed to do so." He further says (5) that the language of s. 10 is " not applicable to an agreement not in writing." Bankes L.J. said (5) : " In my opinion the language of s. 10 is appropriate, and appropriate only, to an instrument in writing " ; and Lawrence J. said (6) that the words of s. 10 " point naturally to a document under seal or in writing. They are not appropriate to an unwritten agreement."

In *Cole* v. *Kelly* (7) both landlord and tenant had respectively signed letters containing either expressly or by implication the terms of the tenancy. Hence there were no dicta in the judgments which throw light on the point before me.

Upon the existing decisions then it stands, therefore, that for the application of s. 10 of the Conveyancing Act, 1881, there must be an " agreement in writing." What is meant by that phrase ? Does it mean that both parties must sign ?

(1) [1916] 2 K. B. 91.
(2) Ibid. 100.
(3) [1917] 1 K. B. 252.
(4) Ibid. 256.
(5) Ibid. 257.
(6) Ibid. 258.
(7) [1920] 2 K. B. 106.

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It is well that there should be so far as possible consistency in English law. Conflicting lines of decisions increase confusion. I therefore take some collateral illustrative cases.

In *In re Thompson* (1) the Court had to interpret the words "an agreement in writing" in s. 4 of the Attorneys and Solicitors Act, 1870. It was held that there was an agreement in writing, even though signed by one party only. This decision was followed by Stirling J. in *In re Jones*. (2) In *Bewley* v. *Atkinson* (3) (approved by Cotton L.J. in *Mitchell* v. *Cantrill* (4)) it was held that a "consent or agreement expressly made or given . . . . by deed or writing" under s. 3 of the Prescription Act, 1832, need only be signed by the licensee. Examples of cases where contracts though signed by one party only have been held to be contracts in writing will at once spring to the mind. I may mention, e.g., *Greaves* v. *Ashlin* (5) (a sold note); *Harnor* v. *Groves* (6) (sold note); and *Reuss* v. *Picksley* (7) (agency contract). The words of Sir George Jessel M.R. in *Pooley* v. *Driver* (8) must, I think, be regarded as limited to the specific matter there dealt with by him.

In the present case the letter of September 7, 1918, embodied in writing the verbal agreement made by the parties, and the writing was signed by the landlord's agent. In my view that letter constitutes a sufficient "agreement in writing" to bring this present case within s. 10 of the Conveyancing Act, 1881. I may give two further reasons in support of my opinion. First, it seems to me that the agreement shown by the letter of September 7, 1918, and which admittedly governed the relations of the parties, could have been specifically enforced (if justice so required) either by the tenant against the landlord who had by his agent signed the writing, or by the landlord against the tenant who had continued in possession of the premises with unequivocal reference to the written agreement: see *Hodson* v. *Heuland* (9)

(1) [1894] 1 Q. B. 462.
(2) [1895] 2 Ch. 719.
(3) (1879) 13 Ch. D. 283.
(4) (1887) 37 Ch. D. 56, 61.
(5) (1813) 3 Camp. 426.
(6) (1855) 15 C. B. 667.
(7) (1866) L. R. 1 Ex. 342.
(8) (1876) 5 Ch. D. 458, 483.
(9) [1896] 2 Ch. 428.

and *Biss* v. *Hygate.* (1) Secondly, it must be remembered that the relation of landlord and tenant is one not merely of contract, but also of estate. The contract of tenancy is peculiar in its aspects and incidents. This view of that species of contract is well shown if the case be taken where a lease duly signed and sealed by the landlord only has been delivered by him to the tenant who has entered into possession thereunder but has signed no counterpart. It would seem clear in such a case that there is a valid agreement in writing within s. 10 of the Conveyancing Act, 1881, in spite of the absence of the counterpart signed by the tenant: see Redman's Landlord and Tenant, 8th ed., p. 165. To hold otherwise would overthrow existing law and would tend to create confusion. It seems to follow that in the case now before me there was an agreement in writing within s. 10 of the Conveyancing Act, 1881, and the decisions thereunder.

In the result, therefore, the plaintiff is I think entitled to sue the defendant for breach of the terms express and implied in the letter of September 7, 1918, the most vital of those terms being the obligation to yield up possession of the premises in such good and substantial repair as should be consistent with the due performance of the covenants of the lease of September, 1895.

I should like to add that I have dealt with this case upon the footing on which it was argued before me. There may well be another ground on which the plaintiff could sue the defendant. I refer to the important fact of actual payment of rent by the defendant to the plaintiff himself after the plaintiff had acquired the reversion and before the defendant gave up possession. The legal consequences which might well spring from that and the other facts of the case will be seen by reference to Redman on Landlord and Tenant, 8th ed., p. 703.

It has become unnecessary for me to consider the effect of the assignment by Nicholls on October 3, 1921, to the plaintiff of the benefit of all the covenants and conditions of the tenancies respectively created in February, 1917, and

(1) [1918] 2 K. B. 314.

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September, 1918, or to apply the decision of *Ellis* v. *Torrington*. (1)

The plaintiff therefore succeeds. The assessment of the amount will involve many intricate details. It is agreed by counsel that the question of damages shall be dealt with by the official referee. There will be liberty to apply.

Judgment for plaintiff.

Solicitors for plaintiff: *Rye & Eyre.*
Solicitor for defendant: *W. H. Hales.*

R. F. S.

No longer law. ROYAL CROWN DERBY PORCELAIN CO., LTD. *v.* RUSSELL. [1949] 1 All E.R. 749.

Considered. ROYAL, ETC. PORCELAIN CO. *v.* RUSSELL. [1949] 2 K. B. 417

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Dec. 2.

FREDERICK BRABY AND COMPANY, LIMITED *v.* BEDWELL.

Landlord and Tenant—Rent Restrictions—Letting to Employee—Letting "in consequence of that employment"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 1 (i.)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

By s. 5, sub-s. 1 (i.), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the existence of alternative accommodation shall not be a condition of an order for the possession of a dwelling-house where the tenant was in the employment of the landlord, and the dwelling-house was let to him "in consequence of that employment," and he has ceased to be in that employment:—

Held, that it must be shown not only that the landlords let but also that the tenant took the premises in consequence of the employment.

Dictum of Lush J. in *Queen's Club Gardens Estates, Ld.* v. *Bignell* [1924] 1 K. B. 117, 132 approved.

APPEAL from Bristol County Court.

The plaintiffs, Frederick Braby & Co., Ld., claimed possession of a dwelling-house occupied by the defendant, Bedwell. In April, 1921, the defendant entered into the employment of the plaintiffs as a welder. Owing to the difficulty in getting houses the plaintiffs purchased several and let them to their employees, one of them, the dwelling-house in question, being let to the defendant at a rent of

(1) [1920] 1 K. B. 399.

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11*s.* per week. The county court judge found as a fact that the house was not let to the defendant in consequence of his employment, although he found that the plaintiffs would not have let it to him but for his being employed by them; and he found that the fact that his tenancy was conditional on his continuing in the plaintiffs' service was not communicated to the defendant at any time before or during the tenancy, and that he always considered himself an ordinary tenant occupying premises under the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17). In November, 1924, the defendant voluntarily left the plaintiffs' service, but did not quit the dwelling-house. The plaintiffs wanted the house for another of their workmen, and accordingly claimed possession in the county court, without offering the defendant alternative accommodation. They relied on s. 5, sub-s. 1 (i.) of the Act of 1920 (as re-enacted in identical terms in s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32)), which provides: "The existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in para. (*d*) of this sub-section—(i.) where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment." The relevant ground in para. (*d*) was (Act of 1923) that "the dwelling-house is reasonably required by the landlord for occupation as a residence for . . . . some person engaged in his whole-time employment. . . . ."

The county court judge, on his findings of fact as set out above, gave judgment for the defendant.

The plaintiffs appealed.

Croom-Johnson and *F. A. Wilshire* for the plaintiffs. The judgment was wrong. The county court judge held that the letting must either be part of the contract of employment, or that the fact that the premises are let as a consequence of his employment must be brought home by notice to the

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tenant. But it is submitted that if in fact the letting is in consequence of the employment the notice to the defendant is unnecessary.

[SANKEY J. Does not the Act only contemplate a service tenancy? This was not a service tenancy.]

No, because a so-called service tenant is not a tenant at all. The proviso applies in all cases where the relation of employer and employee exists between landlord and tenant. It is true that Lush J. in *Queen's Club Gardens Estates, Ld.* v. *Bignell* (1), dealing with the words "in consequence of that employment," said that they meant "not that the landlord only knows, but that both the landlord and the tenant know, that the premises were let to the tenant in consequence of his employment," but that was obiter only. Salter J. apparently came to a different conclusion. (2) He gave no reasons, but could not have applied the same test as did Lush J. The evidence in the present case was all one way, and it must have been abundantly clear to the defendant that what was done was done because he was in the plaintiffs' employment, and that is the proper inference to draw. There was no evidence to support the judge's finding. The proper direction to a jury would have been: Would this house have been let to this man if he had not been in the employment of the plaintiff? If the answer was No, then the house was let "in consequence of that employment."

Wilshere for the defendant was not called upon to argue.

SHEARMAN J. This is an appeal from the Bristol County Court. The plaintiffs sought to recover possession of the dwelling-house in question on the ground that the circumstances bring the case within the provisions of s. 5, sub-s. 1 (i.), of the Rent Restrictions Act, 1920, as re-enacted by the Act of 1923, in that the dwelling-house was let to the defendant "in consequence of" the latter's employment by the plaintiffs. It is not disputed that the defendant was in the plaintiffs' employment, but the question is whether they let the house to him in consequence of that employment. The county

(1) [1924] 1 K. B. 117, 132. (2) [1924] 1 K. B. 137.

court judge found that they did not. That is a question of fact, and we cannot interfere with his finding, unless we are of opinion that in the process of arriving at the conclusion of fact the judge misdirected himself as to the law. Counsel for the plaintiffs contended that it is sufficient to establish that the plaintiffs would not have let the house to the defendant had he not been in their employment. I do not think that that is sufficient. The words "in consequence of" imply causation, and mean that the tenancy was created in consequence of the employment. The Court must be satisfied not only that the landlords let the premises to the defendant in consequence of his being in their employment, but also that the defendant took the premises in consequence of his being in their employment. The judge finds that the defendant did not know that his tenancy was conditional on his remaining in the employment of the plaintiffs; he had never heard of it and knew nothing about it.

There is no direct authority on this point, but there is a dictum of Lush J. in *Queen's Club Gardens Estates, Ld.* v. *Bignell* (1) which is to that effect. He says: "In my view they mean, not that the landlord only knows, but that both the landlord and the tenant know, that the premises were let to the tenant in consequence of his employment." I think that the dictum of that learned judge was right, and that this appeal should be dismissed.

SANKEY J. I agree. The only question for us is whether the county court judge misdirected himself, and it is said that he did so in construing this sub-section. I think the words do not have a unilateral but a bilateral construction, and really mean that the landlord lets and the tenant takes the premises in consequence of the employment. Lush J. said the same thing in the *Queen's Club* case (1) when referring to the words of the sub-section. "In my view they mean, not that the landlord only knows, but that both the landlord and the tenant know, that the premises were let to the tenant

(1) [1924] 1 K. B. 117, 132.

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in consequence of his employment." Here there was very strong evidence indeed that that condition was not fulfilled. There was abundant evidence upon which the judge could find as he did.

Appeal dismissed.

Solicitors for plaintiffs: *Hiscott, Troughton & Grubbe, for Salisbury, Griffiths & White, Bristol.*

Solicitors for defendant: *Rawlings, Butt & Bowyer, for F. E. C. Habgood, Bristol.*

W. L. L. B.

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Jan. 13.

CATTO *v.* CURRY.

Landlord and Tenant—Rent Restriction—Decontrol—Part of Dwelling-house sublet—Possession of sublet Part by Tenant of whole House at End of Sub-tenancy—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

The respondent sublet three rooms in a dwelling-house of which he was the tenant. When the sub-tenant terminated his sub-tenancy and relinquished possession of the rooms the respondent entered into possession of them and, by workmen, executed certain repairs and decorations. It was not disputed that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied both to the whole house and also to the rooms which had been sublet:—

Held, that the Act of 1920 did not cease to apply to the rooms by reason of the provisions of s. 2, sub-s. 1, of the Act of 1923, and of the fact that the respondent had come into possession of them, since the proviso to the sub-section specifically provided that, where a tenant, as distinct from a head landlord, came into possession of part of a dwelling-house which he had sublet, the Act of 1920 should not cease to apply to that part.

APPEAL from Brentford County Court.

The respondent, Thomas Curry, was the tenant at all material times of a dwelling-house known as 442 High Road, Chiswick. In 1921 he sublet to one Castle at a rent of 26*s.* 6*d.* a week two rooms on the ground floor of the premises and a bedroom on the first floor. At the end of January, 1924, Castle gave up possession of the three rooms, which no one occupied for a week or ten days except

workmen, who carried out certain repairs and decorations to the rooms by the direction of the respondent. In February, 1924, the respondent sublet the rooms to the appellant, Leonard Catto, at a rent of 25*s.* a week. On June 25, 1925, the appellant took out a summons in the Brentford County Court for the apportionment of the rent on August 3, 1914, of the premises, 442 High Road, Chiswick, to determine the standard rent of the three rooms occupied by him. The summons was heard by the registrar on July 9, 1925, when it was submitted on behalf of the respondent that, by reason of his having been in possession of the rooms in January and February, 1924, the rooms had become decontrolled by virtue of s. 2, sub-s. 1 (1), of the Rent and Mortgage Interest Restrictions Act, 1923, and that the registrar therefore had no power to make an order for apportionment. The registrar, however, rejected that argument and made an order for apportionment. The respondent thereupon appealed to the judge, who held that "as the landlord's [i.e., the respondent's] workmen were actually on the premises doing work for the landlord for a week or ten days there was actual possession by the landlord, the premises became decontrolled, and there was no ground therefore on which apportionment of the rent could be applied for." The appellant appealed against that decision. It was not disputed that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,

(1) Sect. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, provides: "Where the landlord of a dwelling-house to which the principal Act [i.e., the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sublet, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act."

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applied both to the whole house and to the rooms which had been sublet to the appellant.

Glyn-Jones (*Fortune* with him) for the appellant. The decision of the county court judge that the Act of 1920 had ceased to apply to the rooms occupied by the appellant was wrong. The clear meaning of the proviso to s. 2, sub-s. 1, of the Act of 1923 is that if a tenant, as distinct from a landlord on the one hand and a sub-tenant on the other, comes into possession of part of a dwelling-house which he has sublet the Act of 1920 does not cease to apply to that part. The proviso contemplates three persons with an interest in the sublet premises—namely, a landlord, a tenant, and a sub-tenant, and the words "tenant" and "landlord" are used in it in contradistinction to one another. There is nothing in *Jenkinson* v. *Wright* (1) inconsistent with these submissions.

Humphrey Edmunds for the respondent. The decision of the county court judge was right. The proviso must be read purely in the light of the proceedings before the Court and the parties thereto—namely, the tenant and sub-tenant. The landlord of the whole house does not enter into those proceedings at all, and only a letting and not a sub-letting was contemplated by them. "Tenant" in the proviso, therefore, must be read as including "landlord," and "sub-tenant" as including "tenant," and the provisions of s. 2, sub-s. 1, will apply. The object of the proviso is to secure to a tenant who has obtained possession as against a sub-tenant the protection of the Act of 1920 as against his landlord. It does not mean that the tenant's coming into possession as against the sub-tenant does not decontrol the part of the dwelling-house which has been sublet. In *Jenkinson* v. *Wright* Lord Darling said (2): "I cannot think that the test whether or not a person is the landlord of a dwelling-house depends upon whether he is the owner of the house in fee simple as opposed to the holder of a term of years," and he went on to say that, there being a substantial portion of

(1) [1924] 2 K. B. 645. (2) [1924] 2 K. B. 645, 649.

the term unexpired, the plaintiff, the holder of a long lease of the whole house, was "landlord" within the meaning of the Rent Restriction Acts of a room which she had sub-let to the defendant. Moreover, as between the parties to the present proceedings, the appellant, who is not concerned in any way with the respondent's landlord, is estopped from denying that the respondent is his "landlord" within the meaning of s. 2, sub-s. 1.

[He also referred to *Dunbar* v. *Smith.* (1)]

ACTON J. The point raised before us on this appeal is based on the first proviso to s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, and the question is whether the rooms occupied by the appellant were decontrolled in view of the language of that proviso. The argument advanced by counsel for the appellant is that the proviso contemplates at least three different parties with an interest in the dwelling-house or any part of it—namely, tenant, sub-tenant, and landlord, and that in the phrase "by reason of the tenant being in or coming into possession of that part" the word "tenant" means mesne tenant and distinguishes him from the head landlord on the one hand and the sub-tenant on the other. Counsel for the appellant contends that the true meaning of the proviso is that where part of a dwelling-house to which the Act of 1920 applies is lawfully sublet and the part so sublet is also a dwelling-house to which the Act of 1920 applies—both of which conditions are fulfilled here—the Act of 1920 shall not cease to apply to the sublet part of the premises on the mesne tenant's coming into possession of that part. It is argued on behalf of the respondent that by reason of the respondent's having taken possession of the rooms on the departure of the sub-tenant Castle, and having done certain decorations to them before the creation of the sub-tenancy in favour of the appellant, the appellant's rooms had thereby become decontrolled. To that counsel for the appellant replies that the proviso was inserted in the Act for the express

(1) Ante, p. 360.

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purpose of ensuring that decontrol should not arise in the circumstances of this case. In my opinion that is the right construction of the proviso and, indeed, the only reasonable construction. I have heard no authority cited which conflicts with the argument put forward by counsel for the appellant. *Jenkinson* v. *Wright* (1), so far as it goes, appears to support the argument rather than to be adverse to it, and *Dunbar* v. *Smith* (2) does not seem in any way to affect the present decision of this Court. For these reasons I think that this appeal must be allowed.

TALBOT J. I am of the same opinion. The Act of 1923 provides by s. 2, sub-s. 1, that where the landlord of a dwelling-house to which the Act of 1920 applies is in or comes into possession of the dwelling-house the Act of 1920 is to cease to apply to it. If the Legislature had stopped there, since by s. 12 of the Act of 1920 "landlord" is to be interpreted as including a tenant who sublets to a sub-tenant, the Act of 1920 would have ceased to apply to the rooms occupied by the appellant when the respondent came into possession of them. The Legislature, however, to guard against the consequence that, as between tenant and sub-tenant, the Act should not apply while it remained in force between the head landlord and the tenant, inserted the proviso to s. 2, sub-s. 1, to deal expressly with the subletting of part of a dwelling-house. In the proviso the word "tenant" is used in distinction to the word "landlord," and its plain and unambiguous meaning is that the provisions contained in the first part of the sub-section are not to apply and that the Act of 1920 is not to cease to be of effect in the case expressly described by the proviso—namely, where the tenant, as distinct from the landlord, comes into possession of part of a dwelling-house which has been sublet. If that is the meaning of the proviso the decision of the county court judge, although he has not dealt with this point, is erroneous, because, directing his mind only to the question whether there had been actual possession of the rooms by the

(1) [1924] 2 K. B. 645. (2) Ante, p. 360.

respondent, he held that the Act of 1920 had ceased to apply to the sublet premises, and that the registrar had therefore no right to order an apportionment. The argument put forward on behalf of the respondent is that the proviso must be read as being confined to proceedings between the landlord and his immediate tenant. There is no reason in the language of the statute for giving it that construction, but there is an additional reason for not doing so, as to do so would lead to the injustice of control remaining between the landlord and the immediate tenant, while the immediate tenant would be at liberty without restriction to impose what terms he pleased on a sub-tenant. I agree that the case of *Jenkinson* v. *Wright* (1), so far as it goes, supports the argument against the respondent. It was there assumed by the county court judge, by counsel who appeared for the appellant and by this Court, that if the appellant had been a tenant and not a landlord the sub-section would not have applied. It is true that the point which is raised here was not determined in that case, but that was because no one argued the contrary.

There is only one other point with which I desire to deal. Counsel for the respondent has argued that the appellant here was bound by reason of estoppel to admit that his immediate lessor was his landlord within the meaning of the proviso. That seems to be an absurd argument. When the Legislature has expressly inserted words in a statute for the protection of a sub-tenant it seems to me impossible to say that the sub-tenant is estopped from saying that his tenancy is a sub-tenancy. I am of opinion that the proviso applies here, and that the Act of 1920 has not ceased to apply to the appellant's rooms; that the registrar was right, and that the county court judge ought to have affirmed his decision; and, consequently, that this appeal should be allowed.

Appeal allowed.

Solicitor for the appellant: *H. T. Nicholson.*

Solicitor for the respondent: *W. Firth, Brentford.*

(1) [1924] 2 K. B. 645.

F. C.

1925
Dec. 2.

STANDINGFORD *v.* BRUCE.

Landlord and Tenant—Rent Restrictions—Tenant relinquishing Possession without communicating Intention—"Notice to quit"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5, *sub-s.* 1 (*c*)—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

Where a tenant merely gives up possession of premises without any communication of his intention to the landlord, he does not give "notice to quit" within the meaning of s. 5, sub-s. 1 (*c*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as re-enacted in s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923.

APPEAL from Croydon County Court.

The plaintiff (called herein "the landlord") was the landlord of a four-roomed dwelling-house at South Norwood, which included a kitchen. In 1917 she let the premises to one Wheeler on a weekly tenancy at 14*s.* 10*d.* per week. The premises were then outside the scope of the Rent Restrictions Acts, but subsequently came within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17). The landlord asserted that in the rent book was written a restriction on the right of Wheeler to sublet, but she was unable to produce the rent book: the county court judge was not satisfied that the landlord had used proper diligence in searching for it, and refused to admit secondary evidence. In June, 1923, Wheeler sublet two of the rooms, including the kitchen, to the defendant, called herein the sub-tenant. On May 17, 1924, Wheeler left the premises, without giving the landlord any notice, returning the key to her by post. The two rooms occupied by him thus became vacant, and the landlord re-entered. Owing to the fact that she could not let the kitchen with these rooms she found she could not let them at all, and accordingly applied to the county court judge for an order for possession of the rooms occupied by the sub-tenant, having consistently refused to accept rent from him or to acknowledge him in any way. The sub-tenant contended that he was protected by the provisions of s. 15, sub-s. 3, of the Act of 1920,

which provides that where the interest of a tenant is determined, a sub-tenant to whom the premises or any part of them have been lawfully sublet shall be deemed to become the tenant of the landlord. The landlord contended that s. 5, sub-s. 1 (*c*), of the Act of 1920 applied (1), in that the action of Wheeler in leaving as he did was equivalent to giving notice to quit. The county court judge held that the sub-tenant was a statutory tenant, that no notice to quit had been given by the tenant, Wheeler, and that consequently s. 5, sub-s. 1 (*c*), of the Act did not apply, and non-suited the landlord.

The landlord appealed.

Reginald T. Sharpe for the landlord. The judgment of the county court judge was wrong. The act of Wheeler, the tenant, in leaving the premises, coupled with the return of the key, was equivalent to giving notice to quit within the meaning of s. 5, sub-s. 1 (*c*), of the Act of 1920 as amended, which accordingly applies. *Gilbert* v. *Jordan* (2) shows that an agreement to give up possession on a future date is equivalent to a notice to quit under this sub-section. A fortiori is the actual giving up of possession.

[*Lord Hylton* v. *Heal* (3) was also referred to.]

The county court judge wrongly rejected secondary evidence of the entry in the rent book showing that Wheeler had no right to sublet. He acted on the wrong principle that it is necessary that before admitting it he should be satisfied that an exhaustive search for the primary evidence had been made.

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . . (*c*) the tenant has given notice to quit, and in consequence of that notice the landlord has contracted to sell or let the dwelling-house or has taken any other steps as a result of which he would, in the opinion of the court, be seriously prejudiced if he could not obtain possession."

Sect. 4 of the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), substitutes another section for s. 5 (supra), but re-enacts the above provision in exactly the same words.

(2) [1920] W. N. 309.

(3) [1921] 2 K. B. 438.

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Due—i.e., reasonable—diligence only need be shown: see per Alderson B. in *M'Gahey* v. *Alston*. (1)

The sub-tenant was not a statutory tenant entitled to the protection of the Act because, even on the assumption that Wheeler was not restrained from subletting, he had no right to sublet. Wheeler's right as a statutory tenant was a purely personal one, and he could not sublet. Sect. 15, sub-s. 3, confines its protection to one to whom the premises were "lawfully sublet." There is no authority on the point: see per Scrutton L.J. in *Keeves* v. *Dean*. (2) The words in s. 15, sub-s. 3, of the Act of 1920, "subject to the provisions of this Act," seem to indicate that there are some sublettings—i.e., by a statutory tenant—to which the sub-section does not apply.

[SANKEY J. Although the premises were within the Act, Wheeler never became a statutory tenant.]

Croom-Johnson and *Geoffrey Moseley* for the sub-tenant were not called upon to argue.

SHEARMAN J. In this case the short facts are as follows. The landlord let a four-roomed house to one Wheeler. After a time Wheeler ceased to pay rent, and left the premises without giving any notice that he was going to do so, and the landlord re-entered. It appears that some time before he left Wheeler had let two of the four rooms to the sub-tenant under circumstances of peculiar hardship to the landlord, because owing to the fact that one of the two rooms occupied by the sub-tenant was the kitchen, the landlord found that it would be very difficult to let the other two rooms. The landlord having re-entered declined to accept any rent from the sub-tenant or to acknowledge him in any way, and applied to the county court for an order for possession of the two rooms occupied by the sub-tenant. By s. 15, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined . . . . any sub-tenant to whom the premises or any part thereof have

(1) (1836) 2 M. & W. 206, 214. (2) [1924] 1 K. B. 685, 694.

been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued." I think, therefore, that the general principle laid down by the Act is that the sub-tenant continues to enjoy the protection of the Act, notwithstanding the determination of the tenancy, forfeiture, or re-entry of the landlord, on the ground that the tenancy has come to an end. In this case the sub-tenant claimed the protection of the Act, as he was entitled to do unless there was some provision of the Act to prevent him doing so. It was contended by the landlord that there was such a provision—namely, s. 5, sub-s. 1 (*c*), of the Act of 1920 (1), as now set out in s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923, which provides that no order for possession shall be made unless " the tenant has given notice to quit, and in consequence of that notice the landlord . . . . would . . . . be seriously prejudiced if he could not obtain possession." It was contended that although Wheeler gave no notice to quit in the literal sense he did something which, for the purposes of the sub-section, was equivalent to giving a notice to quit—namely, gave up possession of the premises. It may be that what he did was within the spirit, but it was not within the letter of the Act. Therefore, in my opinion, that provision does not deprive the defendant of the protection of the Act. We were referred to a case: *Gilbert* v. *Jordan* (2), in which it had been argued that surrender was equivalent to a notice to quit; but the principal point argued was whether or not there was a tenancy in existence which could be surrendered, and Lawrence J. having said that he was inclined to think that there was, said further that it did not matter, as the landlord had contracted to sell the house on the faith of the tenant's notice of intention to leave on a specified date. He did not give any considered judgment on the point whether there had been a notice to quit within the meaning of s. 5, sub-s. 1 (*c*), of the Act of 1920, as set out in s. 4 of the Act of 1923. The words " notice to quit " have a

(1) Note (1) ante, p. 467. (2) [1920] W. N. 309.

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Shearman J.

technical meaning, and I do not think there was a notice to quit in this case.

The county court judge held that the sub-tenant was lawfully in possession, because there was no restriction on Wheeler, the tenant, from subletting. The landlord said there was such a restriction written in the rent book, but as she could not produce the rent book, and could not satisfy the judge that she had made due and proper efforts to find it, he would not allow secondary evidence of the entry in the rent book to be given, and the landlord was consequently unable to prove that there was any restriction on subletting. In so deciding the county court judge acted on no wrong principle, and we cannot interfere with his decision on that point. The appeal will be dismissed.

SANKEY J. I agree. The action was brought by the landlord, who was in occupation of part of certain premises. In 1917 she had let the whole premises, containing a kitchen and three rooms, to one Wheeler, and in June, 1923, Wheeler sublet the kitchen and another room to the sub-tenant, as, on the evidence, he was entitled to do. On May 17, 1924, Wheeler left the premises, and the two rooms occupied by him became vacant, the other two, including the kitchen, being still occupied by the sub-tenant. Consequently the landlord found it very difficult to let the rest of the house, and she brought this action for possession. The county court judge directed a non-suit. There are three grounds of appeal. First, that the sub-tenant is a mere trespasser, and can therefore be turned out; secondly, under s. 5, sub-s. 1 (*c*), of the Act of 1920, as amended (1), and, thirdly, on the ground that the county court judge wrongly rejected evidence as to the restriction on subletting. As to the first, I think it is clear on the evidence that the subletting was lawful, and therefore that the defendant was a sub-tenant and not a mere trespasser. As to the second point, which is the chief point in the case, the words of the sub-section are "unless . . . . (*c*) the tenant has given notice to

(1) Note (1) ante, p. 467.

quit." In this case no notice to quit was given either by Wheeler or by the sub-tenant. Wheeler disappeared suddenly. Mr. Sharpe for the landlord wants us to say that the words of the sub-section should be read as if they continued "or has vacated possession." The short answer is that the Act does not say what Mr. Sharpe wants it to say. We cannot read it as meaning that it shall apply where the tenant has gone out of possession without giving notice to quit. My sympathies are with the landlord, though at the same time there would be hardships the other way if our decision were different.

With regard to the rejection of evidence, the county court judge, in rejecting it, applied the right principle. Not being satisfied, after questioning the landlord, that diligent search had been made to find the primary evidence—namely, the rent book—he refused to admit secondary evidence: see Roscoe's Evidence in Civil Actions, 19th ed., vol. i., p. 5. He went out of his way to non-suit the landlord, so that she is not prevented from bringing another action.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *W. A. S. Hellyar & Co.*

Solicitors for defendant: *Ransom & Williams.*

W. L. L. B.

C. A.
1925
Nov. 16.

[IN THE COURT OF APPEAL.]

HOWELLS *v.* POWELL DUFFRYN STEAM COAL COMPANY, LIMITED.

Workmen's Compensation—Accident—Compensation—Accident whilst riding in Coach provided and worked by Employers—Coach hauled by Rope up Incline on Employers' Premises—No Obligation on Workmen to use Coach—Alternative Route—"Accident arising out of and in the course of the employment"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The applicant was a collier who was employed in the respondents' colliery, which was situated on the side of a mountain. For the convenience of their workmen the respondents provided and worked an old railway coach to take them up the last part of the journey to the pit shaft. The coach was drawn up an incline from the point where the men entered it to a point adjoining the colliery proper. The incline was on the premises of the respondents. There was no contractual obligation on the workmen to use the coach. An old road ran nearly parallel with the incline which could be used by the workmen as an alternative route to the pit shaft. On August 26, 1924, the applicant entered the coach to go to his work, but as it was full at the time he was obliged to sit on the footboard. On the way up his knee came in contact with one of the rollers over which the rope ran and he was severely injured. In arbitration proceedings for compensation the county court judge in dismissing the applicant's claim said that but for the decision in *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (1925) 18 B. W. C. C. 1, he would have held that the applicant was entitled to compensation. On appeal:—

Held, that as the applicant had reached the respondents' premises on which he was employed before he entered the coach and was proceeding by it in order to reach the particular spot where his work began, the accident arose out of and in the course of his employment, and that he was therefore entitled to compensation.

Cross, Tetley & Co. v. *Catterall*, post, p. 488, and *John Stewart & Son* (1912), *Ld.* v. *Longhurst* [1917] A. C. 249 followed.

Cremins v. *Guest, Keen & Nettlefolds, Ld.* [1908] 1 K. B. 469; *St. Helens Colliery Co.* v. *Hewitson* [1924] A. C. 59; and *Newton* v. *Guest, Keen & Nettlefolds, Ld.* 18 B. W. C. C. 1 distinguished.

APPEAL from an award of the judge of the Aberdare and Mountain Ash County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The following statement of facts is taken from the judgment of the Master of the Rolls: "This appeal involves the consideration of an application for an arbitration and for an

award by a boy named David Howells, who on August 26, 1924, suffered an accident which led to a very severe injury to his leg. The facts are these: The respondents, the Powell Duffryn Steam Coal Co., are a well-known colliery company, and they have a large number of persons in their employ at this particular colliery. For the purpose of obtaining access to the colliery it appears that they run a certain passenger coach for bringing miners to the actual spot where they take up their lamps and go down the shaft. Now I think it is important just to look at the actual facts a little more closely. It appears that there is at this colliery a hauling engine which is situated where it is for the purpose of making it possible by the power of the engine to haul the trucks up a considerable incline from a point where the sidings, over which the hauling engine operates, adjoin the Great Western Railway. It is necessary for the respondents to get their coal down on to the sidings of the Great Western Railway, and for the Great Western Railway again to be able to distribute it as they may be directed, but the railway track which runs between the sidings of the Great Western Railway and the point where the hauling engine house stands is owned by the respondents. The track, as I say, goes up a steep incline, and the engine hauls up the coaches which are attached to it as its burden. Whether it brings back empty trucks after the coal has been despatched at the sidings of the Great Western Railway or hauls up the coach in which some of the employees are contained, this engine is at all times working under the control of a person employed by the respondents. The track is looked after by persons who are in the employ of the respondents, and the passenger coach is under the control of a man who acts as guard or guide to the coach. Therefore, with regard to the transit of this coach, it is under the control of and run upon a track belonging to the respondents.

Now David Howells, on the morning of August 26, 1924, arrived at the platform where he was accustomed to get on to this coach a little late for the first journey, which the

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HOWELLS v. POWELL DUFFRYN STEAM COAL CO.

coach makes at 6.15 A.M., and took the coach on its second journey at 6.30 A.M. At that time the coach was very crowded, and he got on to the footboard on the off side of the coach. On that side of the coach there is a close proximity between the coach and the roller over which the haulage line which is attached to the coach passes, so that unhappily when the applicant passed one of these rollers, situated as he then was on the footboard of the coach and being unable to risk the loss of his balance, he was unable to give sufficient room to pass by the roller without coming into contact with it, with the result that his knee was struck by this roller over which the line passes and he suffered the injury to which I have referred."

Arbitration proceedings were taken by the applicant for compensation.

The county court judge in deciding against the claim of the applicant said in the course of his judgment that the defence was solely on the ground that the riding on the coach was not in the course of the applicant's employment, and that, having regard to the interpretation put by the Court of Appeal in *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (1) (which was an appeal from his own decision), on the decision of the House of Lords in *St. Helens Colliery Co.* v. *Hewitson* (2), he was of opinion that that defence was sound. As, however, the present case might go further, and the decision of the Court of Appeal in *Newton's* case (1) had been appealed against, he thought it right with all due respect to that Court to call attention to some principles laid down by established authority which might have some bearing on the matter. The learned county court judge then reviewed the cases in point in great detail, and in the course of that review quoted the following passage from the speech of Lord Wrenbury in *Hewitson's* case (3): "If, as in *Stewart & Son* v. *Longhurst* (4), the accident occurs to the man in a place in which he would not be entitled to be, except in order to perform his contract of service, the test is satisfied, because

(1) 18 B. W. C. C. 1.
(2) [1924] A. C. 59.
(3) [1924] A. C. 94.
(4) [1917] A. C. 249.

he is there solely in pursuance of his duty. The same is a fortiori true if he was in a place where he was not only entitled to be, but was bound to be in order to perform his contract of service." The county court judge, continuing, said that to his mind what Lord Wrenbury said of duty there in reference to *Stewart & Son* v. *Longhurst* (1) applied clearly both to the present case and *Newton's* case. (2) *Newton's* case (2) was in principle, and in his opinion on the facts substantially the same as the case before him. The provision of the special means of access by the employers and the use of it by the men established at once between the employers and man the relationship of employers and workman. The men were using a part of the employers' undertaking or machinery to get to their work and they had no right to be there except for that purpose, and the applicant doing something on his masters' behalf was consequently whilst so doing in the course of his employment, as was said by Lord Halsbury in *Cross, Tetley & Co.* v. *Catterall.* (3) He then drew a distinction between going to work and coming from it, and said that an accident occurring while returning from work was not in the course of employment, as the workman was then doing something entirely for himself. He would have had no difficulty in finding in favour of the applicant but for the decision of the Court of Appeal in *Newton's* case. (2)

The applicant appealed. The appeal was heard on November 16, 1925.

Cave K.C. and *A. T. James* for the appellant.

Wingate-Saul K.C. and *Lincoln Reed* for the respondents.

The arguments sufficiently appear from the judgments.

[The following cases were referred to: *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (2); *Longhurst* v. *John Stewart & Son* (1912), *Ld.* (4); S. C. on appeal sub nom. *John Stewart & Son* (1912), *Ld.* v. *Longhurst* (1); *St. Helens Colliery Co.* v. *Hewitson* (5);

(1) [1917] A. C. 249.
(2) 18 B. W. C. C. 1.
(3) Reported post, p. 488.
(4) [1916] 2 K. B. 803.
(5) [1924] A. C. 59.

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Fox v. *Rees & Kirby, Ld.* (1); *Davies* v. *Rhymney Iron Co.* (2); *Cremins* v. *Guest, Keen & Nettlefolds, Ld.* (3)]

POLLOCK M.R. stated the facts as above set forth and continued: The case appears to have been argued mainly as if it were one to which the class of cases now known as railway train cases applied. For my part I cannot think that that is the true category into which the case falls at all. It appears to me to be a case where access was provided for workmen to use when they came to the respondents' premises. It is quite true that it was possible for a workman who was going to his employment to walk along the road and reach the place where he would take up his lamp and go into the mine from the highway, but on the other hand there was here another means of reaching that place where the lamps were picked up, and the area which was traversed from the platform, point D, until the subway was reached was an area all of which belonged to the respondent company. At the point where the coach would stop and discharge its passengers the platform has been pointed out to us, and that is in proximity to the subway which leads immediately down to the shaft of the mine. Whether a man approaching should reach that subway by the highway, or should come to the platform D and then get into the coach which was running on the respondents' set of lines, was, however, a question for his own determination, but none the less he was obtaining access to the respondents' premises if he entered them at the platform D as if he entered them at the nearest point where the subway comes into proximity to the highway.

Now the learned county court judge has found certain facts to which I will refer. He finds this: "For the men living in and about Aberdare, who have further to walk, an old railway coach is provided for the last part of the journey. This coach is drawn up an incline 1035 yards long by means of a winding engine and a rope, from the point where the men

(1) (1916) 9 B. W. C. C. 459.
(2) (1900) 2 W. C. C. 22; 16 Times L. R. 329.
(3) [1908] 1 K. B. 469.

enter the coach to a point adjoining the colliery yard proper, where the men get out of the coach. This incline, which is the property of the respondent company, was really the siding by which railway trucks for taking the coal away from the colliery go up to the colliery tips from a point on the high level branch of the Great Western Railway near Abernant Aberdare station." He finds therefore that the coach and sidings are the property of the respondents. Then further on in his judgment he says : " There is no definite contractual obligation on the men to use the coach. The use of it is optional, and the men can either walk up the road or use the coach as they please." He further says that he is prepared to find the facts in favour of the applicant, and that the use of the coach " by the men under such conditions, establish at once between employers and men the relationship of employers and workmen. The men are using a part of the employers' undertaking or machinery to get to their work, and they have no right to be there except for that purpose." What the learned county court judge has found, therefore, is this, that the premises upon which the applicant entered on that morning in August at the point where he got on to the coach belonged to the respondents ; that he went there, and that his only right to be there was because he was upon the employment of the respondents ; that although in a sense it was optional whether he went to the platform D and took the coach or whether he went by the highway to a nearer point of contact with the subway, still when he did go and take that coach his only justification for taking it was that he was at that point entering upon the employment of the respondents.

The learned county court judge has given judgment in favour of the respondents because he felt himself bound by *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (1), a decision of this Court at a time when I was a member of it. The view which the learned county court judge has taken of that decision is that it compels him in the present case to give judgment for the respondents, although he has his doubts as

(1) 18 B. W. C. C. 1.

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Pollock M.R.

to whether that decision is quite in accordance with some other decisions of the House of Lords. I should, however, like to say this, because it would appear that the learned county court judge was displeased, not to say more, with some observations that I made in the course of my judgment as to the facts which he had found and the course which he had taken in *Newton's* case (1) when it was before him. I hardly think it is necessary on my part to disclaim any intentional offence to the learned county court judge, because I have a genuine respect for him and I should be sorry to think that he was under any misapprehension, for misapprehension it was, that my words were to be taken in that sense. What I did say was that it seemed to me that on the findings he had come to in that case he had disassociated the case from the decision in *St. Helens Colliery Co.* v. *Hewitson* (2), a very important case which it then appeared to me, and still appears to me, it was necessary for us to consider in *Newton's* case. (1) But I have said what I have about the learned county court judge's judgment out of respect for him and for his judgment in *Newton's* case (1) and in the present case, and inasmuch as Scrutton L.J. was a member of the Court as then constituted and is not a member of the present Court I am authorized by him to say that he joins in the observations which I have made in order to establish, I hope to the satisfaction of the learned county court judge, that no discourtesy to him was intended by either of the members of the Court. It appears to me now that the course that was taken by this Court in *Newton's* case (1) was the right one. I understand that case is going to the House of Lords, and it will be found whether or not our decision is in accordance with *Hewitson's* case. (2) But it is really quite unnecessary for me to say anything more about *Newton's* case (1), because I am myself satisfied that neither *Newton's* case (1) nor *Cremins* v. *Guest, Keen & Nettlefolds, Ld.* (3), nor *Hewitson's* case (2), affords us a direct guide to the decision at which we ought to arrive in the present case. They lay down certain

(1) 18 B. W. C. C. 1. (2) [1924] A. C. 59.
(3) [1908] 1 K. B. 469.

propositions, or contain certain observations to which I may refer, but neither the actual decision in *Newton's* case (1) nor that in *Hewitson's* case (2) appears to me to govern the present case.

With regard to the cases to which I think attention should be directed, it appears to me important to go back to *Longhurst's* case (3), as it was decided first of all in the Court of Appeal. Be it noted also, as indicating that *Newton's* case (1), *Hewitson's* case (2), and *Cremins'* case (4) are to my mind not of primary importance in the present case, that *Longhurst's* case (5) was not cited to us when *Newton's* case (6) was argued before us. Now in *Longhurst's* case (5) Pickford L.J. said (6): "The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment." When that case came before the House of Lords (7), Lord Dunedin (8) borrowed those words of Pickford L.J. Lord Finlay, then Lord Chancellor, had, however, in his speech previously put the case in this way (9): "Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and he *may* be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies." Emphasis is given to the word "may" because, no doubt, a finding of fact will be necessary in order to bring that proposition into operation. Lord Finlay, however, makes it quite clear that in certain cases a man may be regarded as in the course of his employment if an accident happens to him before he has actually taken up the instrument of his labour and is on his way to or from his work. That, in principle, is in accordance with what

(1) 18 B. W. C. C. 1.
(2) [1924] A. C. 59.
(3) [1916] 2 K. B. 803.
(4) [1908] 1 K. B. 469.
(5) [1916] 2 K. B. 803; on appeal [1917] A. C. 249.
(6) [1916] 2 K. B. 803, 806.
(7) [1917] A. C. 249.
(8) Ibid. 257.
(9) Ibid. 253.

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Lord Halsbury said when giving judgment in *Cross, Tetley & Co.* v. *Catterall* (1), which has not been reported, but in which case we have had the actual judgments of this Court before us, because Atkin L.J. obtained the printed book which was presented when the case was argued in the House of Lords. Now Lord Finlay (2) also referred to *Holness* v. *Mackay & Davis* (3), a case in which Romer L.J. differed from the majority of the Court. He approved of the judgment that was given by Romer L.J., and I will read a passage from that judgment. Romer L.J. says (4): "To my mind the present case is like that of a workman whose work lies in a particular part of a large factory, and who in order to get to it has to go through the rest of the factory and meets with an accident while so going." Finally Lord Atkinson says (5): "It unquestionably conferred upon him the right, if permitted by the dock company, to traverse the premises of that company from the dock gate to the place where the barge he was working on lay. It imposed upon him an obligation to do so." Referring to that last sentence it appears to me when one comes to consider this case that the applicant was rightly on that coach only if he was there for the purposes of his employment by the respondents. The analogy was put by Mr. Cave when he opened this case, and I think it is a sound one, that it is as if there were two gates or opportunities of access to the respondents' colliery, one direct from the highway to the subway where the subway leads to the shaft, and the other the platform which led to the coach which brought the employee to the other end where the subway was. It appears to me that the right test to apply, therefore, is the test which belongs to the course of decisions previous to and summarized in *Longhurst's* case (6), and not to the course of decisions in what I have called the railway train cases, which reached the highest point on the one side or the other in *Hewitson's* case. (7)

(1) Reported post, p. 488.
(2) [1917] A. C. 249, 253.
(3) [1899] 2 Q. B. 319.
(4) [1899] 2 Q B. 329.
(5) [1917] A. C. 249, 258.
(6) [1917] A. C. 249.
(7) [1924] A. C. 59.

Now looking at the case from that point of view, it appears to me that we ought to take the facts as found by the learned county court judge, the facts which are intended to be found in favour of the applicant and from which, as I understand, he implies that he thought that the applicant was upon the respondents' coach for the purpose of and only in justification of his being in the employment of the respondents—at the time of the accident he was not at a point where, as in *Cremins'* case (1), or in *Newton's* case (2), or in *Hewitson's* case (3), he was in the course of going to the place where the employment was about to begin, but he was at a place where, as in *Longhurst's* case (4), he had to pass from one part of his employers' premises to another in order to get to the particular point at which his actual employment began. Applying that test to the facts as I gather them to be found by the learned county court judge, it appears to me that there is evidence on which the learned county court judge could come to a conclusion favourable to the workman in accordance with the principle of *Longhurst's* case (4), and that he was not embarrassed, and need not have been embarrassed, as he thought he was, by the decision of this Court in *Newton's* case. (2) If he had not been so embarrassed by what he conceived to be the importance and weight of *Newton's* case (2), in the present case he would have made an award in favour of the applicant. In my opinion *Newton's* case (2) is rightly to be distinguished from the present case, and therefore the right course would be to allow the appeal and to let the matter go back to the learned county court judge to deal with and make an award in favour of the applicant on the evidence that will then be before him.

ATKIN L.J. It is plain in this case from the learned judge's findings of fact that he would have decided in favour of the applicant if he had not felt himself bound as a matter of law by *Newton's* case (2) to decide for the respondents. The learned judge has entered into a long explanation of his

(1) [1908] 1 K. B. 469.
(2) 18 B. W. C. C. 1.
(3) [1924] A. C. 59.
(4) [1917] A. C. 249.

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findings in *Newton's* case (1), making it plain that a judge overruled may be of the same opinion still, and intending I think that if that case is considered in the House of Lords their Lordships should have an opportunity of knowing what the learned judge on further consideration thought about it. To my mind *Newton's* case (1) does not govern this case or prevent the learned judge from giving effect to the conclusions of fact to which he came. The case raises the old controversy as to the period of time and the point of space at which a workman's employment begins, and it appears to me to be very necessary to distinguish between two classes of cases which I venture to think really involve different considerations. One class of case is where a workman is journeying to the premises where he is employed and the other class of case is where the workman is on the premises where he is employed, and is journeying to the particular spot where his particular work is to be performed. Now cases such as *Newton's* case (1), *Hewitson's* case (2), and *Cremins'* case (3), and the other cases to which we have been referred, appear to me to be all cases where a workman had not in fact reached the premises where he was employed but was travelling in a vehicle provided by his employers or using facilities which his employers had at any rate assisted to provide for him: the question being whether he could then be said to have entered upon his employment, so that an accident happening to him then would be an accident arising out of and in the course of the employment. I have nothing to say about those cases; they bind me. I have no intention whatever of expressing any opinion of my own as to the conclusions which were reached in *Newton's* case (1), but in a case of that kind it appears to be necessary for the workman to show that he is under a contractual obligation to use the facilities provided by his employer before he can say that an accident happening whilst he was using them is an accident arising out of and in the course of his employment. But the present case appears to me to be a different one. It is a case where, as

(1) 18 B. W. C. C. 1. (2) [1924] A. C. 59.
(3) [1908] 1 K. B. 469.

I gather from the findings of the learned county court judge, the workman had in fact reached the premises upon which he was employed and was proceeding by, it may be an alternative way, but by a permitted way, and was using it in a permitted manner, to get to the actual spot which he had to reach, and that being so the learned judge was, in my opinion, justified in finding that the workman, when he met with the accident, met with it in the course of his employment, and in the circumstances of the case, that the accident arose out of his employment.

Now, as I say, I do not intend to refer to *Newton's* case (1) or *Hewitson's* case (2), because they seem to me to be quite plainly cases in which the workman had not in fact reached the premises where he was employed. But on the other point there are several cases which have been referred to, and as to which one might say a word or two. The principal case appears to be *Longhurst's* case (3), which is perhaps a stronger case than the present. There the workman was in fact employed upon a barge, but he could not get to or away from the barge—he was in fact getting away from it—without going over the dock. I am not sure which dock it was, but it was one of the London docks, and it was held there that an accident which happened to him whilst he was on the dock, and though he was leaving his work, was an accident which happened to him in the course of his employment. In his judgment in that case Lord Finlay L.C. cites with obvious approval—he was, of course, bound by it—the case of *Cross, Tetley & Co.* v. *Catterall* (4), which he says has been repeatedly cited but has not as yet been reported. As that case is referred to in more than one case, I think probably it would be of advantage if those who are responsible for reporting workmen's compensation cases were to put it in a place where it is more accessible than it is at the present moment. It can now only be found in the appendix to the House of Lords case and in the judgments which are apparently available in the House of Lords Library. But the facts in

(1) 18 B. W. C. C. 1.
(2) [1924] A. C. 59.
(3) [1917] A. C. 249.
(4) Reported post, p. 488.

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that case, I think, are rather important. I am taking them from the appendix to the House of Lords case, which I have sent for. There the respondent resided on the north side of a canal, the south bank of which bounded one side of the appellants' premises, and colliers living on the north side of the canal could proceed to their work in the appellants' pits at the colliery either by crossing a footbridge which spanned the canal or by following the highway, which was about half a mile longer than by crossing the footbridge. On the colliery side the footbridge was built upon land belonging to the appellants and within the boundary of the colliery premises. On the north side of the canal the footbridge abutted upon the towing path of the canal. In that state of facts the learned county court judge found that it was maintained by the appellants on the colliery premises as the way by which their workmen residing on the north side of the canal could go to the pit mouth and so avoid the danger of crossing the sidings on the colliery premises, that the appellant company had entire control of the footbridge, and no one had the right to use it without their permission. The learned county court judge came to the conclusion that the employment of the applicant had commenced at the time of the accident. In giving judgment in the Court of Appeal, Collins M.R. said: "Now, on those findings the man was actually upon the colliery premises at the time of the accident, and he was on his road to his employment—he was then to go about 100 yards or more to get to the first place that he had to go to, namely, a lamp-house—I think about half a hundred yards—for the purpose of doing his work. Therefore it seems to me that this is really a question of fact, and that the learned county court judge has decided it upon the evidence, and that we have no jurisdiction to quarrel with his decision. It is quite clear that the obligation of the master governs the man before he is actually engaged in hewing coal—quite clear. There is a margin of time and place during which the man is going to the master; in this case the man had actually reached the place, and is on the premises and his road to do his day's work. I think this raises a

question of fact and that the learned judge has found the facts." Then Mathew L.J. says: "The workman was on the premises of his employers, using a way which they had invited him to use for the purpose of going to his work, therefore an entrance to the colliery from a public highway leading up to the colliery. It seems to me that the man's employment would have begun when he got to the colliery premises and on his way to his work." This being the decision given by the Court of Appeal, it was affirmed in the House of Lords without calling upon counsel for the respondents, and apparently Lord Halsbury said this—I am reading from the judgment as quoted in the report of *Stewart & Son* v. *Longhurst* (1): "I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment at the moment he reached the bridge. He was doing something on his master's behalf; that is to say, he was on his way to the colliery for the purpose of working."

The only other case to which I think I need refer is *Fox* v. *Rees & Kirby, Ld.* (2), because there are two passages there which I think are relevant. That was a case in which a workman was proceeding to some munition works. He was a fitter's labourer employed by a firm of engineers engaged in erecting plant of a munition factory. He lived at Burry Port, about two miles away, which is not very far from Llanelly. The factory was in an isolated place and he was injured while proceeding on the track. There was no direct road to the factory, but a private railway had been constructed to provide a means of transport to and from the munition works. Pickford L.J. quotes (3) with approval the following passage from the judgment in Kennedy L.J. in *Gane* v. *Norton Hill Colliery Co.* (4): "I asked, in the course of the argument that was addressed to us by Mr. Simon for the appellants, what fact he could point to other than facts on which the other side might rely, and I was told of two—first, the existence of three ways from the colliery,

(1) [1917] A. C. 249, 252.
(2) 9 B. W. C. C. 459.
(3) 9 B. W. C. C. 459, 466.
(4) [1909] 2 K. B. 539, 547.

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and, secondly, that though he took this route there was no direction to him to take it. To my mind the respondent cannot rely on those facts at all. I do not think it matters whether there were three ways or twenty ways, if they were all ways by which the workman faithfully doing his duty to his employer would with that employer's knowledge be entitled to go." It appears to me in this case that the county court judge has found, and there was evidence upon which he could so find, that this was a way by which the workman faithfully doing his duty to his employer was with the employer's knowledge entitled to go. Warrington L.J. in *Fox* v. *Rees & Kirby, Ld.*, says (1): "I think the accident did happen, as it happened in that case, in the course of his employment, because the employment involved the reasonable means which the applicant, with the sanction of his employers, adopted of getting from the boundary of that which must in substance be treated as the employer's land to the actual spot on that land where he used to do his work. I think, therefore, that the accident in this case arose out of and in the course of his employment."

Now it seems to me to be unnecessary to say more. There was ample evidence on which the learned county court judge could find that this was a case where the man had reached his employers' premises. I have referred to the definition of "mine" in the Coal Mines Act, 1911, which, by s. 122, includes: "every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground in and adjacent to and belonging to the mine," and I have no doubt myself at all but that in respect of this particular tramway, which was drawn by a continuous rope, as I understand, that it came within s. 66, which provides that: "Competent persons appointed by the manager for the purpose shall— . . . . (*b*) once at least in every week, examine thoroughly the state of all other machinery, gear, and other appliances of the mine which are actually in use, whether above ground

(1) 9 B. W. C. C. 459, 467.

or below ground." It seems to me that that would apply quite plainly to this rope tramway, to the haulage machinery, to the rope, and to all the other appliances. I do not propose to consider whether under the Act this is a haulage way, because if it is a haulage way it becomes still more apparent, I think, that this is part of the actual mine.

In those circumstances it appears to me that there should have been an award in favour of the applicant. No question arises now as to whether or not this workman had taken upon him some additional risk so as to prevent him from saying he was using a permitted way in the permitted manner. It is exactly the same case, as I put in argument, as though he was sitting within the coach and the coach had by some accident become derailed. It seems to me that it would be a very remarkable result if in fact workmen who were injured under those circumstances should not be entitled to receive workmen's compensation, though that plainly would be the result of the learned county court judge's decision as he laid it down with reluctance on the supposed authority of *Newton's* case. (1)

I think, therefore, that this appeal should be allowed and that the case should be remitted to the learned county court judge to assess the proper compensation.

SARGANT L.J. In my view the tramway with this coach, rope, engine and platform constitutes, and has been found by the learned county court judge to constitute, a part of the employers' works, and this fact differentiates the case altogether from *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (1) In that case a conveyance was provided by the employers off their premises for the purpose of giving access to their works. Here the workman, having already obtained access to a part of the works of the respondent company—namely, the platform at the bottom of the incline—is afterwards using an authorized path to get to the scene of his actual labours, and in such case the principles we have to apply are those laid down in *Stewart & Son, Ld.* v. *Longhurst.* (2) Applying those

(1) 18 B. W. C. C. 1. (2) [1917] A. C. 249.

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principles to the facts expressly or impliedly found by the learned county court judge, I agree that the appeal should succeed.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kensholes & Prosser, Aberdare.*

NOTE.

HOUSE OF LORDS. MARCH 16, 1905.

CROSS, TETLEY AND COMPANY, LIMITED *v.* CATTERALL.

Appeal from an order of the Court of Appeal affirming an award of the judge of the Wigan County Court in an arbitration under the Workmen's Compensation Act, 1897.

The following statement of facts is taken substantially from the statement of the case for the appellant company in the printed case presented to the House of Lords.

The respondent John Catterall, a collier, was, in December, 1902, in the employment of the appellants, who were colliery proprietors. He was employed in number 4 pit of the appellants' colliery at Bamfurlong, Lancaster. The mouth of the pit was situated about 100 yards from a lamp cabin, and before proceeding to his work in the pit, the respondent had to go to the lamp cabin and obtain there his lamp and tally, without which he could not proceed to his work in the pit.

The respondent resided on the north side of the Leeds and Liverpool Canal, the south bank of which bounded one side of the appellants' premises, and colliers living on the north side of the canal might proceed to their work in the appellants' pits at the colliery either by crossing a footbridge, which spanned the canal, or by following the highway, but the distance from the respondent's residence to the lamp cabin was about half a mile greater by the highway than by the footbridge.

On the south side of the canal the footbridge was built on land belonging to the appellants and within the boundary of the colliery premises; on the north side of the canal the footbridge abutted upon the towing path of the canal. On each side of the canal steps led from the ground to the footbridge, and the total length of the footbridge (including such steps) was 99 yards. From the bottom of the steps on the south side of the canal to the lamp cabin the distance was 158 yards.

The footbridge was regularly used by members of the public as a road between the villages of Platt Bridge and Bryn Gates, as well as by colliers in the appellants' employ.

On December 8, 1902, the respondent was proceeding to the lamp cabin for the purpose of obtaining his lamp and tally by way of the footbridge, and

whilst crossing the bridge he slipped and fell and sustained personal injuries, which disabled him from earning wages at the work at which he was employed.

On April 7, 1903, the respondent applied for an arbitration to determine (inter alia) the liability of the appellants to pay compensation to him in respect of the accident under the provisions of the Workmen's Compensation Act, 1897.

On April 25, 1903, the appellants filed an answer to the application in which they denied their liability to pay compensation to the respondent on the ground that the injury to him was not caused by accident arising out of and in the course of the employment.

On May 12, 1903, the arbitration came on for hearing before His Honour Judge Bradbury in the Wigan County Court.

At the hearing it was admitted by the parties that the respondent while proceeding to his work slipped on the footbridge crossing the canal and was injured. It was also admitted that the appellants were the owners of the land on the south side of the canal and of the bridge over the same.

The county court judge found as facts that the footbridge was erected and maintained by the appellants on the colliery premises as the way by which their workmen residing on the north side of the canal should go to the pit mouth and so avoid the danger of crossing sidings on the colliery premises: that the appellants had entire control of the footbridge and that no one had a right to use it without permission.

It was contended before the county court judge on behalf of the respondent that as the respondent was on the appellants' premises and on the way to his work the accident to him arose out of and in the course of the employment.

On behalf of the appellants it was contended that the accident having occurred to the respondent before he reached the lamp cabin at which his employment began, and before his work had commenced or he had identified himself as a servant of the appellants and whilst he was not under the control of the appellants, did not arise out of and in the course of his employment.

The county court judge held that the accident arose out of and in the course of the respondents' employment and awarded him compensation at the rate of 1*l.* per week from December 22, 1902, to March 5, 1903, with costs.

On May 28, 1903, the appellants gave notice to the respondent of appeal to the Court of Appeal against the award of the county court judge.

The appeal came before the Court of Appeal for hearing on December 11, 1903, and was dismissed.

The following judgments are taken from the transcript of the shorthand note of the judgments printed in the Appendix to the case.

COLLINS M.R. This is an appeal from the decision of a learned county court judge—Judge Bradbury, who has decided in favour of the workman. The workman was a miner, and he was going to his work on a certain day and passing over a certain bridge that had been built by his employers for the convenience of the workmen and others having occasion to obtain access to their premises. In passing over this bridge, and after he had got over to the boundary of the masters' premises, he fell and hurt himself, and the question was whether the accident happened on, in, or about the factory—the mine—and whether it arose out of and in the course of his employment. Now I do not think I can do better than read what the findings of fact of

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the learned judge himself are upon this point of the case. They are as follows: "I find as facts that the footbridge was erected and maintained by the respondent company on the colliery premises as the way by which their workmen residing on the north side of the canal should go to the pit mouth and so avoid the danger of crossing the sidings on the colliery premises. That the respondent company had entire control of the footbridge, and no one had a right to use it without their permission." Now, on those findings the man was actually upon the colliery premises at the time of the accident, and he was on his road to his employment—he was then to go about 100 yards or more to get to the first place that he had to go to—namely, a lamp house—I think about half a 100 yards—for the purpose of doing his work. Therefore it seems to me that this is really a question of fact and that the learned county court judge has decided it upon the evidence, and that we have no jurisdiction to quarrel with his decision. It is quite clear that the obligation of the master governs the man before he is actually engaged in hewing coal—quite clear. There is a margin of time and place during which the man is going to the master; in this case the man had actually reached the place, and is on the premises and his road to do his day's work. I think this raises a question of fact and that the learned judge has found the facts. [His Lordship then dealt with the cases that had been cited.]

MATHEW L.J. I am of the same opinion. Mr. Ruegg's argument was that the learned county court judge must have misdirected himself. The workman was on the premises of his employers, using a way which they had invited him to use for the purpose of going to his work, therefore an entrance to the colliery from a public highway leading up to the colliery. It seems to me that the man's employment would have begun when he got to the colliery premises and on his way to his work.

COZENS-HARDY L.J. I agree and have nothing to add.

The employers appealed to the House of Lords, and the appeal was heard on March 16, 1905.

H. H. Asquith K.C. and *Rigby Swift* for the appellants.
Atherley Jones K.C. and *Adshead Elliott* for the respondent.

LORD HALSBURY L.C. My Lords, it seems to me that the facts found by the county court judge remove the question really from argument. This bridge is one of the expedients for shortening the way of the workmen to their work. Apparently, according to the finding of the county court judge, this man had got to one of the erections put up for the express purpose of enabling the workmen to get to the premises. The man was on his way to the premises. I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment at the moment he reached the bridge. He was doing something on his master's behalf, that is to say, he was on his way to the colliery for the purpose of working. He was going to get his lamp. I do not quite know, if one is to be extremely accurate, at what point of time it is suggested that the employment begins. Must he be actually down the pit? That is hardly arguable. If he is going down, for instance, in the cage,—no one would doubt that he was in the employment when he was

going down in the cage for the purpose of getting the coal. Supposing he is on his way, nearer to the pit than this man was,—approaching the pit,—still using some of the conveniences of the colliery for the purpose of getting to his work: Would that be "in the course of his employment"?

My Lords, I should hesitate very much to lay down any rule by which it should be tested whether or not a person was "in the employment." It is a question essentially of the facts of the particular case and the circumstances by which it is surrounded. All I say is that to my mind this is a pure question of fact. In order to be in the employment you must say at some point or another that the man was actually doing something on his employers' behalf. I think this man was doing something on his employers' behalf here. Of course it might be said, if when he was getting up to go to his work in the colliery he had had an accident in his own bedroom, that then he was doing something on his employers' behalf: that would be reducing the matter to an absurdity on the other side. All I can say here is I think there were facts upon which the county court judge might properly come to the conclusion that the man was actually on his employers' business at that moment in the employers' premises and doing something which it was essential for him to do in order to do his employers' work.

What I might have thought if it were res integra I will not speculate. All I can say is that there has been a finding in the county court and I am not disposed to differ either from the county court judge or from the Court of Appeal.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I concur.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I am of opinion that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for appellants: *William Pingree Ellen, for Edwin Peace, Liverpool.*
Solicitors for respondent: *Burn & Berridge, for James Wilson, Wigan.*

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[IN THE COURT OF APPEAL]

RUSH *v.* MATTHEWS.

Landlord and Tenant—Rent Restrictions—Evasion of Statute—Verbal Agreement to pay Rent exceeding standard Rent—Lease for Fourteen Years at standard weekly Rent—Separate Agreement to pay also weekly "Premium" —"Premium" terminable with Tenancy—Action to recover "Premium" —Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 1, 8, *sub-s.* 3.

By a verbal agreement a landlord let a flat, the standard rent of which was thirteen shillings and sixpence, to the tenant at a rent of twenty-five shillings per week, but, with the admitted intention of evading the Rent Restrictions Acts, the parties executed a lease of the flat for fourteen years (whereby the payment of a premium became lawful) at the standard rent of thirteen shillings and sixpence per week, with a proviso that the tenant might terminate the tenancy by giving one week's notice to quit, and at the same time made a separate agreement in writing that the tenant should pay to the landlord a "premium" of eleven shillings and sixpence weekly, this, with the above rent, aggregating the twenty-five shillings per week so verbally agreed. By reason of the provision as to notice to quit, the "premium" terminated with the tenancy:—

Held, in an action to recover one week's payment of the eleven shillings and sixpence, that the transaction must be looked at as a whole and the two documents read together, and that, so dealt with, the eleven shillings and sixpence was part of the rent and not premium, and was, as such, irrecoverable.

Judgment of Divisional Court affirmed.

APPEAL from Divisional Court. (1)

The respondent, the plaintiff William Belmer Rush (called herein "the landlord"), was the landlord of a flat, 231 Portnal Road, Paddington, in the County of London. In October, 1922, the defendant, the appellant Walter Albert Matthews (called herein "the tenant"), in response to an advertisement, saw the landlord's daughter, Miss Winifred Rush, who in fact conducted the landlord's business, with a view to becoming tenant of the flat. The county court judge's note of Miss Rush's evidence was as follows: "I told him [the tenant] situation of flat and that the rent would be 25*s.* per week. That this was a flat to which the Rent Restrictions

(1) Ante, p. 75.

Acts applied and that in order that I could get the 25*s.* per week a lease [for fourteen years] would have to be granted embodying a rent of 13*s.* 6*d.*, and 11*s.* 6*d.* would be by way of premium, and I should also require a premium of 10*l.* on the signing of the lease." By s. 8, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), the provisions of the section prohibiting the payment of a premium were not to apply in the case of the grant of a lease of fourteen years or upwards. A rent of 13*s.* 6*d.* per week was the standard rent with permitted increases. The tenant agreed to this, and accordingly a lease dated October 28, 1922, was executed demising the flat to the tenant for fourteen years from October 30, 1922, at a "yearly rent of thirty-five pounds two shillings by fifty-two equal payments of thirteen shillings and sixpence on the Monday of every week." Clause 4 (*c*) provided: "The tenant may be at liberty to determine this lease upon giving one week's notice in writing." The tenant also covenanted not to assign or underlet the premises.

On the same date, October 28, the tenant by a separate agreement in writing with the landlord agreed: "In consideration of your having granted me a lease for fourteen years [of the said flat] with the option to determine the same on one week's notice I hereby undertake to pay to you the sum of 11*s.* 6*d.* weekly by way of premium commencing on October 30, 1922." This agreement was not mentioned in the lease. The 13*s.* 6*d.* mentioned in the lease and the 11*s.* 6*d.* in the above agreement together amounted to 25*s.* weekly. The tenant was given two books, a rent book and a "premium" book, containing receipts for the above sums respectively. The tenant duly paid both these sums for the first six weeks, and the 10*l.* premium, but then refused to pay the sum of 11*s.* 6*d.* referred to in the agreement as "premium." The plaintiff issued this plaint to recover the week's "premium" payable under the agreement on December 18, 1922.

The county court judge gave judgment for the landlord for the amount claimed.

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On appeal the Divisional Court (Sankey and Salter JJ.) reversed that decision. The landlord appealed.

Wingate-Saul K.C. and *Ronald Walker* for the appellant. The decision of the county court judge was right. The motive of the landlord in dividing the 25*s.* into two sums, one for rent and the other for premium, was immaterial, and the arrangement come to between the parties led to no evasion of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The main object of that Act was to secure fixity of tenure, and the chief ground provided for granting possession of premises is the non-payment of rent. The tenant here could not be ejected for non-payment of the 11*s.* 6*d.* premium, but only if he did not pay the 13*s.* 6*d.* rent. None of the incidents of rent attached to the premium. The landlord could not recover it as rent nor distrain on non-payment of it. Any increases of rent would be a percentage on the net rent of 13*s.* 6*d.* and not on the 25*s.* It was open to the landlord to charge a premium, but it was useless asking a man in the tenant's circumstances to pay it in a lump sum. It was, therefore, to be paid by weekly instalments. It was also considered right that if the tenant gave a week's notice he should not have to pay the premium in full. It was said before the Divisional Court that the premium agreement could not be enforced for uncertainty, because it did not state for how long the weekly payments were to be made. It was obvious, however, that that document and the tenancy agreement referred to each other, that they were contemporaneous documents and ought to be read together, and it was clear, if that were done, that the premium ceased to be payable when payment of the rent stopped. The premium was payable either for fourteen years or for the duration of the tenancy.

Doughty K.C. and *Monier-Williams* for the respondent were not called upon.

BANKES L.J. In my opinion, this appeal fails. I confine my judgment to the question whether or not the particular

facts of this case bring it within the terms of s. 8, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. I offer no opinion whether it might or might not have been possible to escape the operation of the Act, and I do not propose to discuss the means by which that might have been done. Sect. 8, sub-s. 3, provides that the prohibition imposed by sub-s. 1 against a landlord's requiring a premium or any other form of pecuniary consideration as a condition of the grant of a tenancy shall not apply to the grant, renewal or continuance for a term of fourteen years or upwards of any tenancy. It is quite true that in this present case a tenancy for fourteen years was created by a lease, but the Court has to consider whether the arrangement made was one under which rent was charged and paid in excess of the amount which could justifiably have been charged under the Act of 1920. There are two ways of ascertaining the real position. First, by a consideration of the evidence of the landlord's daughter, which was frankly given before the county court judge. As I read the conversation which she had with the tenant, the only construction to be put upon it is that the rent would be 25*s.*; that that amount could not be charged as rent; and that the rent would, therefore, be called by two names, "rent" and "premium," and two documents would be executed to show that part of the 25*s.* was rent and part was premium. If that is the true construction of the conversation it is clear that the parties were agreeing about the rent of the premises and nothing else, and that the second document providing for payment of part of the rent as premium was a mere sham which can, and ought to, be disregarded. From this point of view the case falls within the terms of the Act of 1920. Secondly, the Court can look at the documents. By itself, the document relating to the premium is void for uncertainty. It provides for the payment of weekly premiums of 11*s.* 6*d.*, beginning on October 30, 1922, without saying for how long they are payable. To suit his own purpose the landlord asks the Court to look at the lease, which, he says, is contemporaneous with, and should be read with, the document

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relating to the premium, and to hold that the tenant agreed to pay 11*s.* 6*d.* a week as premium so long as the tenancy continued. Let us suppose, however, that the tenant gave a week's notice before the expiration of the term, as he was entitled to, might not the landlord say, with respect to the premium, that it must be paid, as he had granted the tenant a term of fourteen years, and it was solely the tenant's affair that the week's notice had been given? It is impossible without also looking at the tenancy agreement to say that the agreement for the payment of the premium is so certain as to be capable of being given effect to, and, if to interpret the premium agreement, reference is made to the tenancy agreement, the inference is irresistible that the two documents really refer to the payment of rent, but that for the sake of convenience and to evade the statute, this method of the two agreements is adopted.

On the particular facts of this case, from whatever way they are looked at, the landlord cannot succeed. The appeal will be dismissed with costs.

WARRINGTON L.J. I agree, and for the same reasons. I only wish to add that I have arrived at this conclusion on the facts of this particular case, and I do not express any opinion on what might or might not be thought sufficient to bring the premises within s. 8 of the Act of 1920.

ATKIN L.J. I agree. The agreement to pay the premium did not represent the true facts of the case; for the premium really represented rent.

Appeal dismissed.

Solicitor for appellant: *H. A. Phillips.*
Solicitors for respondent: *Hiscocks & Co.*

J. F. C.

Approved. ROBERTS *v.* DOROTHEA SLATE QUARRIES CO., LTD. [1948] 2 All E.R. 201.

[IN THE COURT OF APPEAL.]

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WILLIAMS *v.* GUEST, KEEN AND NETTLEFOLDS, LIMITED.

Workmen's Compensation—Miner suffering from Silicosis contracted through long use of a Boring Machine—Industrial Disease not scheduled—"Accident"—Series of Accidents—Gradually cumulative Injury—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 8.

A miner, who had been employed in boring rock top for a period of ten years, and who towards the end of that period had only been able to work at intervals of a few months owing to shortness of breathing which finally resulted in total incapacity, was found to have fibrosis of both lungs due to his having breathed in particles of silica dust which came from the boring operations, and which in process of time had settled in his lungs, eventually producing silicosis.

It was admitted that as silicosis was not a scheduled disease for miners, the applicant could only recover on the ground that he was suffering from an injury by accident within s. 1 of the Act of 1906.

The county court judge came to the conclusion that the applicant was suffering from silicosis resulting from the boring operations, but that as his condition was brought on gradually it was not due to an accident, and that he was not entitled to compensation :—

Held, that the gradual inhalation of particles of silica throughout a long period did not amount in any ordinary sense to an accident, or a series of accidents ; that the case was analogous to a case of lead poisoning, and that the applicant was not entitled to compensation.

Steel v. *Cammell, Laird & Co.* [1905] 2 K. B. 232 followed.

The meaning of "accident" discussed.

APPEAL from a decision of the judge of the Mountain Ash County Court.

The applicant was a miner in the employment of the respondents. In 1914 he began using a boring machine in one of their mines, and at times he had to bore the overhanging or top hard rock. This he did by placing the machine against his shoulder and boring the rock above him. In June, 1922, he was found to be suffering in his breathing, and he had to give up the work. He recommenced it in 1923, but again had to discontinue the work owing to the same cause. The same thing happened again in 1924. He commenced again in 1925, but had to give it up in April of that year, and he had not since then been able to work owing to shortness of breathing. It appeared from the medical

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evidence that the applicant had an extraordinary fibrosis of both lungs, which led to the conclusion that his condition was caused by breathing in particles of very irritating matter; that in the course of working the boring machine a certain amount of dust had arisen part of which would be dust from silica encountered in the boring operations; that this dust had settled in his lungs, a certain amount only of which was expelled by coughing; and that the rest had gradually settled and had eventually brought the lungs into the condition called silicosis.

The county court judge came to the conclusion that the applicant was suffering from silicosis as the result of being engaged for a long period in the work of boring rock top, but that as his condition was brought on gradually it could not be said to be due to an accident, and that he was really suffering from an industrial disease which was not scheduled.

The applicant appealed.

The appeal was heard on November 23, 1925.

The Workmen's Compensation Act, 1906, s. 8, provides that the Act shall apply to certain industrial diseases which are scheduled; these do not include silicosis. Under the Workmen's Compensation (Silicosis) Acts, 1918 and 1924, silicosis is an industrial disease scheduled for certain workmen in particular trades, but the Acts do not apply to miners.

Montgomery K.C. and *Trevor Harries* for the appellant. An injury resulting in an industrial disease may be an injury by accident: *Brintons, Ld.* v. *Turvey.* (1) This disease has come on gradually, but it has resulted from a very large number of accidents caused by the grains of silica coming into the lungs from time to time. If the silicosis had been the result of one particle of silica entering the lungs there can be no doubt that that would have been an accident; and a series of such accidents bringing about the same result stands on the same footing. The cumulative effect of a number of accidents, although no one of the accidents in particular can be said to be the cause of the incapacity, is

(1) [1905] A. C. 230.

enough to cause an injury by accident: *Selvage* v. *Charles Burrell & Sons, Ld.* (1); *Innes or Grant* v. *Kynoch.* (2)

[ATKIN L.J. This case appears to be covered by the decision on lead poisoning in *Steel* v. *Cammell, Laird & Co.* (3), which has not been overruled.]

In that case and in the "beat hand" case: *Marshall* v. *East Holywell Coal Co.* (4); and the "beat knee" case: *Gorley* v. *Backworth Collieries* (5), the Courts seem to have thought that those particular injuries were the inevitable result or the inherent predisposition of the employment, but that does not apply in the present case, for rocks may be bored for years and no silica encountered. What pressed upon Collins M.R. in *Steel* v. *Cammell, Laird & Co.* (3) was that he could not fix any time at which the injury by accident came about; it was too gradual to be definitely ascertained. But in the present case there were appreciable times when the silica was absorbed and made its presence known.

Cave K.C. and *Victor Evans* for the respondents. This is an industrial disease which in time should be extended to miners, but it was contracted gradually and was not an accident. *Selvage* v. *Charles Burrell & Sons, Ld.* (6), was a case of a number of cuts each of which was clearly an accident, and there must have been something which enabled the time of the accident to be fixed. In order to recover there must be some circumstance which enables the date of the accident to be fixed. There was none in this case, which is covered by the decision in *Steel* v. *Cammell, Laird & Co.* (3), and the medical evidence here is more analogous to the evidence in that case than in the other cases which have been cited.

They also referred to *Broderick* v. *London County Council* (7) and *Eke* v. *Hart-Dyke.* (8)

Montgomery K.C. in reply.

POLLOCK M.R. This case has raised an interesting point. The facts are these: [His Lordship stated the facts and

(1) [1921] 1 K. B. 355; 14 B. W. C. C. 158.
(2) [1919] A. C. 765.
(3) [1905] 2 K. B. 232.
(4) (1905) 7 W. C. C. 19; 93 L. T. 360.
(5) Ibid.
(6) [1921] 1 K. B. 355.
(7) [1908] 2 K. B. 807.
(8) [1910] 2 K. B. 677.

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continued :] The learned county court judge considered the matter carefully, and he says he came to the conclusion: "That the applicant was suffering from silicosis as the result of being engaged for a long period in the work of boring rock top, but that as his condition was brought on gradually it could not be said to be due to an accident. The man was really suffering from an industrial disease which is not scheduled."

I therefore come back to the words of the Act itself. By s. 1 of the Act of 1906, if, in his employment, personal injury by accident arising out of and in the course of the employment is caused to a workman, he is entitled to compensation during the disability which arises from the accident. That clearly connotes that there must be an accident which happens. By s. 8 it is provided that the Act shall apply to certain industrial diseases which are scheduled, but do not include silicosis. Under the Workmen's Compensation (Silicosis) Acts, 1918 and 1924, silicosis is an industrial disease for certain workmen in some particular trades, but it is not scheduled for miners. Hence the applicant is not entitled to apply under s. 8 and say he is suffering from an industrial disease which enables him to make use of the scheme of the Act as set out in s. 8. He has to rely upon s. 1.

Whether it is the case of an accident, or the case of an industrial disease, some notice has to be given to the employer. Under s. 2 provision is made for notice of the accident being given as soon as practicable. By s. 8 it is provided that: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given."

In some cases which have attempted to deal with the very difficult question of what is an accident, a test has been suggested that if it is an accident within the meaning of the Act it ought to be such an accident as would enable notice of it to be given. That test breaks down, because we have in recent cases indicated that a man is not bound to give

notice, or rather that he cannot give notice, as soon as practicable unless and until he has certain prognosis of the injury he has received which would justify his belief that a serious disability, or a disability within the meaning of the Act, was flowing from the accident. More than that, in *Innes or Grant* v. *Kynoch* (1), which went to the House of Lords, the question of the test of notice was in some measure dealt with. In that case the difficulty that arose from an impossibility of giving the precise date of an accident was not held to create such a disability as prevented the workman from recovering under the Act. Lord Wrenbury said: "As regards the point that the appellant has failed to fix the date at which the accident happened, I think the Act is satisfied in that respect if, having regard to the nature of the particular injury alleged, the date of the occurrence of the accident is reasonably fixed so as to connect the injury with the accident." On the other hand, it is not right to say that the old principle of there being some date or period for the purpose of indicating when the accident happened has gone. Lord Birkenhead said (2): "That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident." It is clear, therefore, from the statement I have made about ss. 1 and 8 that a distinction is drawn between what I may call external accidents and a right to compensation which is specially given by s. 8 in consequence of a workman suffering from an industrial disease.

It is not merely the difficulty of finding a meaning from the terms of the Act of Parliament, or what Parliament intended, but a difficulty which arises from the nature of human events. It is impossible to define what is the meaning of an accident in all cases, or completely within this Act. Suffice it to say that in most cases it will be possible when the facts are brought to one's attention to recognize whether an accident has happened or not, although in a case of this nature difficulties are suggested by Mr. Montgomery, who puts the present case before us as a case where there has been over a long

(1) [1919] A. C. 765, 800. (2) Ibid. 772.

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period of years a series of accidents by means of each of which a molecule of silica has entered the lungs of the workman. Mr. Montgomery does that in order to try to bring himself within the principle of *Selvage* v. *Charles Burrell & Sons, Ld.* (1) In that case a girl was engaged in an operation upon a machine which led to her, not unnaturally, sustaining scratches upon her hand, and she did get a number of scratches over a period of some eight or twelve weeks. From the pus that formed she contracted blood-poisoning and, although she was not able to say which particular scratch or cut was the basis of her illness, the Court of Appeal held, and the House of Lords also held, that although there was no evidence to support the finding of an incapacity arising from a particular cut on a particular day, there was conclusive evidence that her condition resulted from the cumulative effect of the series of accidents met with in her work, and that the award of the county court judge in her favour was right, although he had attributed her condition to a particular cut on a particular day. It is clear, therefore, from *Selvage* v. *Charles Burrell & Sons, Ld.* (1), that you may have an accident which arises from a series of events. Mr. Montgomery then says: "It is true that silicosis is not an industrial disease for miners. It is true that I cannot tell you the particular date when the accident happened, when the first molecule of silica went into the lung, but I can tell you that over the period of time these molecules have continually infested the lungs and have brought about his condition; therefore, following the principle of *Selvage* v. *Charles Burrell & Sons, Ld.* (1), there has been an accident." I do not think that that reasoning is good.

We have to treat the meaning of the word "accident" according to its known or common signification, and although in a particular case it may be difficult to determine whether there has been what that critic who is sometimes set up to us as giving the standard—the man in the street—would call an accident, still in the reported cases one has to find that there has been some external cause which can be described

(1) [1921] 1 K. B. 355.

as an accident. Lord Buckmaster in his speech in *Innes or Grant* v. *Kynoch* (1) says: "Death due to disease differs widely from death due to other injury in many obvious respects. The actual occurrence and onset of the illness cannot be stated with the same certainty: the possibility of infection from other sources than the source of infection present at work cannot be overlooked; and the difficulty of bringing these conditions within the common meaning of the phrase 'accident' is in itself considerable." He then goes through a number of cases in which he shows where the workman has succeeded and where he has failed, and perhaps it is fair to say that the cases where the workman has failed are cases in which the causation between the possibility of infection or accident and the ultimate result complained of has been long, has been gradual, and is open to some question. Lord Atkinson differed from the conclusion of the House of Lords in that case, but in making his observations on the various cases he speaks of the case where "beat hand" and "beat knee" are contracted by a gradual process in the course of more or less prolonged work. In those cases the workman failed to recover. He also adds that he found no accident in that case external to the workman himself, which was the effective cause, immediate or mediate, of the injuries he sustained. He makes those observations, not as the basis of his judgment, but as general observations in relation to cases under the Workmen's Compensation Act. We have to decide whether the county court judge was wrong in coming to the conclusion that the workman was not entitled to recover when these conditions were brought on gradually, when there was no particular point at which it could be said that the accident occurred, and when he also found that in effect the workman was suffering from what is an industrial disease not scheduled in the miner's favour at the present time.

After looking at all the cases I find it quite impossible to say what is an accident, but I do not think it is possible to say that in the present case the county court judge has not

(1) [1919] A. C. 765, 774.

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rightly directed himself. I think that he was correct in saying that the operation of the work itself, which the applicant undertook to do, proceeding gradually over a long period of time, is not such an act as was intended to be connoted by s. 1 of the statute, and that if the workman is to be entitled to recover, it must be through securing that that particular disease, slow in its cumulative effect, should be scheduled so as to be brought within s. 8 of the Act, for such cases belong to the sphere of s. 8 alone rather than to the sphere of s. 1. For these reasons I think that the county court judge rightly directed himself, and that therefore we cannot interfere with the decision which he has reached. The appeal will be dismissed with costs.

ATKIN L.J. I agree that the appeal should be dismissed, and I do so solely because I consider that this Court is bound by the decision in *Steel* v. *Cammell, Laird & Co.* (1), which it is impossible to distinguish from the facts of this particular case.

It is an interesting case, because on the facts it appears to be definitely proved that a miner who had worked for a long time in a coal mine had in fact in the course of his employment contracted the disease of silicosis, and no doubt had been reduced to a very bad state of health. If coal mining had been included in the Schedule to the Workmen's Compensation (Silicosis) Acts, 1918 and 1924, no question could have arisen, but inasmuch as that has not been done, the workman's sole claim must be in respect of the ordinary right to compensation by reason of having suffered an injury from an accident arising out of and in the course of his employment, because the disease is not scheduled as an industrial disease under s. 8. The learned judge in one passage of his judgment rather seems to suggest that because it is an industrial disease, and because it is not scheduled, the workman is not entitled to compensation. That would be an error, because, as was established before the section dealing with industrial diseases came into the Act of 1906, a man

(1) [1905] 2 K. B. 232.

might have incurred an industrial disease and still get compensation, as in the well known case of *Brintons, Ld.* v. *Turvey* (1), in which case a man unfortunately contracted the disease of anthrax as the result of his employment, and it is to be noted that he recovered compensation under the ordinary principles of it being an accident arising out of and in the course of his employment. It is also to be noted that anthrax is now an industrial disease under s. 8, and, in addition to that, s. 8 itself provides, no doubt having in view the decision in *Brintons, Ld.* v. *Turvey* (1), that "Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this Act." So we are still constrained, in the case of an unscheduled disease though it may be called an industrial disease, to consider whether or not it arises by accident arising out of and in the course of the employment, and that is the question which the learned judge has decided.

There can be no doubt, I think, that the conception of an accident under the Act has been gradually enlarged, and I think that there is the enlargement to which I have referred in *Brintons, Ld.* v. *Turvey*. (1) I can only refer to what was said by Lord Birkenhead when he was Lord Chancellor in *Innes or Grant* v. *Kynoch* (2), when he says with, if I may respectfully say so, a great deal of truth: "In *Brintons, Ld.* v. *Turvey* (1) it was held by this House, Lord Robertson dissenting, that the assault of a bacillus upon a workman proceeding from the wool upon which he was working, and affecting him with mortal anthrax, was an accident, and that the consequent and fatal disease was an injury. In that case, therefore, the essentials of the composite phrase 'injury by accident' were satisfied. This decision may easily prove with the development of scientific discovery to be one of far reaching importance." He also said: "When *Brintons*' case (1) was decided the area conceded by contemporary science to idiopathic disease was much larger than is the case to-day.

(1) [1905] A. C. 230. (2) [1919] A. C. 765, 770.

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It follows that the area of disease which is now traced to infection by bacillus has correspondingly grown. The result is that the decision in *Brintons'* case (1) is likely to increase in range," and this, no doubt, is one of the cases which seeks to increase the range in *Brintons'* case. (1)

But now it has to be remembered that infection by bacillus, even though you do not know at what time or place the bacillus entered the body, may be an accident, as in the case of *Brintons, Ld.* v. *Turvey.* (1)

It also has to be remembered that the cumulative effect of a series of accidents may still entitle the workman to compensation, as in *Selvage* v. *Charles Burrell & Sons, Ld.* (2), in which case the girl in the course of her employment contracted in the course of four months a series of small cuts or abrasions the effect of which was to cause an incapacity, and it was held that it was not necessary to be able to name and give evidence of the precise time at which the accident happened which had caused the incapacity.

Under those circumstances, it would appear to me to be a little difficult to reconcile the decisions as to the invasion of the bacillus being accidental, and the contention that the invasion of a body by a foreign particle, or a series of foreign particles, cannot be accidental. We know poisons take different forms. I suppose it would not be unscientific to describe the invasion of the body by bacillus as being a form of poisoning, and there can be no doubt that poisons can operate mechanically, or they can operate in other ways on the constitution. They may operate at once by chemical combination, or there may be, as I have said, mineral poisons which operate sometimes almost solely by mechanical causes, and it is not, to my mind, very easy to distinguish a case of a mineral poisoning from the case of poisoning by bacillus. But, on the other hand, there are a great number of industries in which, unfortunately, the nature of the industry does expose the workmen to poisoning, and to mineral poisoning, and one of them is lead poisoning. One of these industries is the class of industry where people have to handle and work

(1) [1905] A. C. 230. (2) [1921] 1 K. B. 355.

with lead, and lead poisoning is one of the best known forms of industrial disease, and is, in fact, scheduled to the Act.

This question of lead poisoning fell to be considered before the industrial diseases section was introduced into the Workmen's Compensation Act of 1906, and was decided in the case of *Steel* v. *Cammell, Laird & Co., Ld.* (1) That was a case in which a workman, whose employment necessitated the handling of white and red lead, gradually accumulated lead in his system, with the ultimate result that he suffered from lead poisoning, which produced partial paralysis, and incapacity to work, and it was held by the Court of Appeal that that was not an injury by accident. But I cannot distinguish the case of a person gradually accumulating lead in his system, with the ultimate result that he was incapacitated, from the case of a person who gradually accumulates particles of silica in his system from which he ultimately becomes incapacitated. They are both minerals, and they both act in very similar ways, at any rate in ways which I find it impossible to distinguish for the purpose of forming any satisfactory judicial distinction. Under those circumstances, without expressing any final view at all as to what the position would be if it were not for that case, I find myself bound by that decision, and come to the conclusion that there was no accident. I should say that I do not think that *Steel* v. *Cammell, Laird & Co.* (1) can be distinguished solely upon the ground that the Court, or some of the members of the Court, thought it necessary at that time that you should be able to prove and give particulars of the precise day, time, and place at which the accident happened. If that were so, I think that the case would be distinguished, because I think that *Innes or Grant* v. *Kynoch* (2) has disposed of that view, but, as I have said, the decision remains. It appears to bind us in the circumstances of the present case. It has never been overruled, and therefore it appears to me that this appeal ought to be dismissed.

(1) [1905] 2 K. B. 232. (2) [1919] A. C. 765.

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SARGANT L.J. I am of the same opinion. The learned county court judge has come to the conclusion: "That the applicant was suffering from silicosis as the result of being engaged for a long period in the work of boring rock top, but that as his condition was brought on gradually it could not be said to be due to an accident. The man was really suffering from an industrial disease which is not scheduled." Of course there was plenty of evidence, uncontradicted evidence, on which the learned county court judge came to the conclusion, and the question we have to deal with is whether he misdirected himself in point of law in saying this was not an accident, because it was something which came on gradually and was of the nature of an industrial disease.

What is an accident within the meaning of the Workmen's Compensation Act, 1906, has to be determined, the House of Lords has said, by the meaning of the word "accident" in ordinary parlance, and it seems to me that, in the words of Lord Birkenhead in *Innes or Grant* v. *Kynoch* (1), it would mean some particular occurrence happening at some particular time, otherwise it is not in the nature of an accident. What that particular time was is immaterial, so long as it reasonably appears that it was in the course of the employment.

I think that it is not immaterial to see how the Act dealt with the question of industrial diseases, because it appears to recognize that injury arising out of industrial disease is not, generally speaking, and apart from the special provisions of the Act itself, an accident at all. What the statute does—and it is to be remembered that the statute was passed after the decision in *Steel* v. *Cammell, Laird & Co.* (2)—is to provide that in the case of general industrial diseases, the disease is to be deemed a personal injury by accident, and special provisions are made as to the date at which the accident is deemed to have occurred, and so on. Therefore, I think there is evidence in the statute itself to show that injury arising from industrial disease is not prima facie injury arising from accident, and I can find no case—no case has been cited—in which there has been a gradually cumulative

(1) [1919] A. C. 765. (2) [1905] 2 K. B. 232.

injury extending over a long period of time similar to, or at all comparable with, the time in this case, in which it has been held that there was an injury by accident.

In the case of *Steel* v. *Cammell, Laird & Co.* (1), which was a decision of this Court and which, though often referred to, and referred to in *Innes or Grant* v. *Kynoch* (2), has never been, as far as I know, dissented from, the decision of the Court that the lead poisoning was not to be deemed an accident was, in my view, founded mainly—I am referring now to the judgment of Sir Richard Henn Collins M.R.—on this reasoning in the following sentence : " In any case, the result must have come about through long exposure to contact with the lead, and gradually, not suddenly." It seems to me that that was the main reasoning on which the Court decided that the injury could not be said to be due to an accident in any ordinary sense of the term.

The case which comes nearest to the present is *Selvage* v. *Charles Burrell & Sons, Ld.* (3), in which the girl who claimed compensation had received a series of cuts or scratches over, I think, a period of something like four months. But there was a great difference from the present case, because each one of the cuts or scratches might very well have been said to be an accident, and it was not shown that it was essential to those scratches producing the disease from which she suffered that they should have been cumulative in their effect over a long period of time.

In the present case the period of time over which the accidents, if there were accidents, were accumulative in their effect is something like eight years, and it is difficult to say that there was any one particular accident at any one particular date to which the person could point, or which could be identified in any way. There was the inhalation of these obnoxious particles over that period. Sometimes, according to the evidence probably more often at first, the particles would be expelled by coughing, and subsequently they would gradually accumulate until the disease reached the point at

(1) [1905] 2 K. B. 232. (2) [1919] A. C. 765.
(3) [1921] 1 K. B. 355.

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which the workman was unfit to go on with his work. But in my judgment that did not amount, in any ordinary sense of the term, to an accident. It was of the nature of an industrial disease, and although the Act expressly provides that "Nothing in this section"—that is s. 8 of the Act of 1906—"shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this Act," still, for the reasons which I have stated previously, the whole introduction of s. 8 and the language in which it is framed seem to me to be strong evidence that an injury arising by the gradual and cumulative effect of industrial conditions producing disease was not regarded by the framers of the Act as being within the ordinary sense of the word "accident," and therefore liable to be compensated for under any section other than s. 8 itself.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

R. M.

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Feb. 18, 19.

Practice—Costs—Taxation—Claim and Counterclaim—Apportionment—Costs occasioned by Counterclaim.

The plaintiff in a county court action for damages for negligence failed, and the defendant's counterclaim for damages for negligence also failed. Both claim and counterclaim arose out of the same event. The judge held that in taxing the costs of the counterclaim items common to claim and counterclaim, which had already been dealt with in taxing the costs of the claim, should be apportioned:—

Held, that only such extra costs on the counterclaim should be allowed to the plaintiff as were occasioned thereby.

Saner v. *Bilton* (1879) 11 Ch. D. 416 and *Christie* v. *Platt* [1921] 2 K. B. 17 considered.

Appeal from Reading County Court before Scrutton and Sargant L.JJ. (sitting as additional judges of the King's Bench Division).

The plaintiff, Ernest Lodge Wilson, brought an action in the above court against the defendant, A. E. Walters, claiming damages for injuries caused to his motor car by the alleged negligent driving of another motor car by the defendant. The defendant denied negligence, alleged contributory negligence on the part of the plaintiff, and counterclaimed damages against the plaintiff. In the result the county court judge gave judgment for the defendant on the claim, with costs, and for the plaintiff on the counterclaim, with costs. On taxation the registrar acted on the following principle: he first took the claim and gave the defendant the costs. He then proceeded with the counterclaim, and gave the plaintiff such extra costs as he had incurred in defeating the counterclaim. If, in the latter case, he came to an item which had been already considered in dealing with the costs of the claim he did not give the plaintiff anything in respect of that item in the counterclaim, because he had already dealt with it in considering the defendant's costs of defeating the claim. On appeal to the county court judge, he held that whenever there was an item common to both claim and counterclaim, the costs should be apportioned.

The defendant appealed.

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A. Ralph Thomas for the appellant. The principle of taxation adopted by the registrar was correct, and the county court judge in ordering the costs of items common to claim and counterclaim to be apportioned was wrong. The rule applicable to this case was laid down by Fry J. in *Saner* v. *Bilton* (1), where the circumstances were similar. He said: "The proper course will be this: the plaintiff in the original action shall pay the general costs of action, and the defendant, who is to pay the costs of the counterclaim, shall only pay the costs of the proceedings so far as they have been increased by reason of that counterclaim. The principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. The plaintiff in the action first lets out the waters of litigation, and it is impossible to say how far the counterclaim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counterclaim should only bear the amount by which the costs of the proceedings are increased by it. I need not add that in every case the Court can give special directions which may vary the rule. . . . ." This was approved by the Court of Appeal in *Mason* v. *Brentini*. (2) It follows from that that an item common to claim and counterclaim would not be an extra item of cost caused by the counterclaim. In *Baines* v. *Bromley* (3), which was a case where the plaintiff succeeded on his claim and the defendants on their counterclaim, Brett L.J. said (4) that the proper method was to take the claim as if it were an action, and then to take the counterclaim as if were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turned, which was in effect the method in *Saner* v. *Bilton*. (5) The matter was again fully discussed by the Court of Appeal in *Atlas Metal Co.* v. *Miller* (6), and the principle of *Saner* v. *Bilton* (5) was again adopted.

(1) 11 Ch. D. 416, 418.
(2) (1880) 15 Ch. D. 287.
(3) (1881) 6 Q. B. D. 691.
(4) (1881) 6 Q. B. D. 695.
(5) 11 Ch. D. 416.
(6) [1898] 2 Q. B. 500.

But in *Christie* v. *Platt* (1) the taxing master had followed *Atlas Metal Co.* v. *Miller* (2) literally, with the result that the defendant, who won her counterclaim on what was in substance the only issue in the action, received practically no costs, while the plaintiff received her full costs. It was there held that what must be looked at are the real costs incurred in establishing the claim or counterclaim respectively. In the present case the issue common to both claim and counterclaim was that of negligence, which was dealt with in taxing the costs of the claim ; the costs of that issue ought not, therefore, to be given to the plaintiff on the counterclaim, and the county court judge was wrong in apportioning them. It is only in exceptional cases, where the issues are different, that there should be apportionment. Here there was one issue—namely, which of the parties was guilty of negligence.

[*In re Brown* (3) ; *Shrapnel* v. *Laing* (4) ; *Jones* v. *Stott* (5) ; and *James Crean & Son, Ld.* v. *J. Steen M'Millan* (6) were also referred to.]

No counsel appeared for the respondent.

SCRUTTON L.J. This appeal raises a question of some little interest and some little difficulty as to the taxation of costs. Two motor cars ran into each other at cross-roads. The plaintiff, the owner of one of the cars, brought an action against the defendant, the owner of the other car, and the defendant counterclaimed. As is usual in cases of collisions at cross-roads, each contended that the other was to blame, and in the result the defendant succeeded on the claim, and the plaintiff succeeded on the counterclaim. Then came the question how the costs were to be taxed. The registrar, acting in accordance with certain decisions of the Court of Appeal, if applicable, taxed them on this principle : he first took the claim, and gave the defendant the costs of resisting the claim. He then proceeded with the counterclaim, and he gave the plaintiff such extra costs as he had incurred by

(1) [1921] 2 K. B. 17.
(2) [1898] 2 Q. B. 500.
(3) (1883) 23 Ch. D. 377.
(4) (1888) 20 Q. B. D. 334.
(5) [1910] 1 K. B. 893.
(6) [1922] 2 I. R. 105.

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defeating the counterclaim. If, in the course of the plaintiff defeating the counterclaim, he came to an item which had been already considered in the claim, he did not give the plaintiff anything on that item in the counterclaim, because he had already dealt with those costs in dealing with the defendant's costs in defeating the claim. There was an appeal then to the county court judge, and he came to the conclusion that the matter fell within another decision of the Court of Appeal: *Christie* v. *Platt* (1), which he thought applied, and he, whenever there was an item which was common to the claim and counterclaim, apportioned the costs. Hence this appeal by the defendant.

There have been, I think, five or six decisions on this subject in the Court of Appeal, and there has been one which, in my view, is a very interesting decision in the Irish Court of Appeal. The matter stands in this way: There is a case of *Saner* v. *Bilton* (2), which came before Fry J., as he then was, on a question of taxation of a claim and counterclaim, and before giving his decision Fry J. took the opinions of the taxing masters in Chancery, who consulted the common law taxing masters, and their report was this (3): "I"—that is the Chancery taxing master who signed the opinion—"however, after much consideration, considered that where the plaintiff succeeds in all that he claims, he is, notwithstanding the defendant succeeds on a counterclaim, entitled to his full costs, except in so far as they are occasioned or increased by the counterclaim, and so, if the plaintiff's action is dismissed with costs, the defendant is entitled to full costs against the plaintiff, except such additional costs as are occasioned by the counterclaim. The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the common law masters, who agreed

(1) [1921] 2 K. B. 17. (2) 11 Ch. D. 416.
(3) 11 Ch. D. 417, note (1).

in this view, but it is only a matter of opinion, there having been no decisions." Thereupon Fry J. stated the principle (1): "The proper course will be this: the plaintiff in the original action shall pay the general costs of action, and the defendant, who is to pay the costs of the counterclaim, shall only pay the costs of the proceedings so far as they have been increased by reason of that counterclaim. The principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. The plaintiff in the action first lets out the waters of litigation, and it is impossible to say how far the counterclaim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counterclaim should only bear the amount by which the costs of the proceedings are increased by it." That decision of Fry J. was approved by the Court of Appeal in *Mason* v. *Brentini* (2), where Sir George Jessel, giving judgment, says: "I entirely agree with the decision of Fry J. in *Saner* v. *Bilton* (3), and for the reasons which he has given; and am of opinion that his judgment is to be considered as expressing the rule of the Court." The case also came before the Court of Appeal in *Atlas Metal Co.* v. *Miller* (4), where the claim and counterclaim were two libels, and Lindley M.R., giving the judgment of the Court, practically acted on the rule which had been laid down by Fry J. and gave an exposition of the reasons why he thought such a rule should be followed.

It became clear, however, that that rule would not work justice in all the cases which might arise; and a case which showed that some distinction must be drawn came before the Court of Appeal, sitting in interlocutory matters, in *Christie* v. *Platt.* (5) There a landlord claimed against her tenant for rent. The tenant pleaded as a defence that there was an implied term that the premises should be habitable, and then pleaded, as a counterclaim, that there was an implied

(1) 11 Ch. D. 418-419.
(2) (1880) 15 Ch. D. 287, 289.
(3) 11 Ch. D. 416.
(4) [1898] 2 Q. B. 500.
(5) [1921] 2 K. B. 17.

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warranty that the premises should be habitable, and counterclaimed damages. It was clear that there was no defence to the claim for rent, so that the plaintiff succeeded on her claim, but after a prolonged fight on the counterclaim the tenant succeeded, and although all the time had been taken up on the issue raised in the counterclaim whether the premises were habitable, the taxing master, carrying out, as he thought, the decision of the Court of Appeal in the *Atlas Metal* case (1), gave the plaintiff 214*l.* 5*s.* as her costs, and gave the defendant the sum of 3*l.* 0*s.* 5*d.* only as costs. This, as the Court of Appeal said, looked wrong and must be wrong, and they held that the common costs should be apportioned. Having read the judgments in the cases to which I have referred, and in three other cases to which I have not referred, where Lord Esher contributed some obiter dicta to the discussion, I was not at all clear what the line of distinction was; but speaking for myself, I have had the great advantage of reading a very elaborate and careful discussion of the matter in the Irish case of *James Crean & Son, Ld.* v. *J. Steen M'Millan.* (2) That case went through four Courts altogether, and there are very elaborate judgments by three Lords Justices, the Lord Chancellor, and the Master of the Rolls. There was one dissentient, Ronan L.J., but the other four judges agreed, and O'Connor L.J. in the Court of Appeal for Southern Ireland gives what to my mind is an extremely instructive judgment, going through the cases, discussing (3) every item which would ordinarily occur in a taxed bill of costs, and stating his views as to it. I will refer again to the judgment of O'Connor L.J., which was accepted by the final Court, the High Court of Appeal for Ireland. In the judgments of that Court a test was laid down for distinguishing between cases where one would apply the *Saner* v. *Bilton* (4) rule, and those where one would apply the procedure in *Christie* v. *Platt* (5), and the Lord Chancellor says this (6), after referring to two Irish cases: "In these

(1) [1898] 2 Q. B. 500.
(2) [1922] 2 I. R. 105.
(3) Ibid. 114.
(4) 11 Ch. D. 416.
(5) [1921] 2 K. B. 17.
(6) [1922] 2 I. R. 130.

last two cases we get to the root of the matter, and are able to get a principle that will guide the taxing master. Wherever there is a separate and substantial question raised by the counterclaim, there must be substantial costs paid in relation to the counterclaim, and it follows that there must be an apportionment of the costs. But, on the other hand, where the subject matter of the counterclaim is identical with the defence or part of the defence, in that case the taxing master should not apportion, but simply allow such extra costs as have been incurred by reason of the counterclaim. This view seems to me to be the foundation of the decision in *Christie* v. *Platt* (1), and is consistent with almost all the decisions in England or here. I do not say that it quite agrees with all the language used by the learned judges in arriving at these decisions"—a remark with which I entirely agree. Andrews L.J. in the same Court formulates the principle in this way (2): "Whether the common items in the costs (i.e., the items which contain something apparently common to both claim and counterclaim) should be allowed in full to the successful party on the original claim, or should be apportioned as between the claim and counterclaim, depends in each case upon whether such costs were in truth and in fact occasioned solely by the claim or partly by the claim and partly by the counterclaim. Such costs are regarded as being occasioned solely by the claim and are, accordingly, allowed in full to the party who succeeds in the claim, when the counterclaim is a counterclaim in form only, and is in reality in the nature of a set off: *Samuel* v. *Burnham* (3), or where it is really a defence in disguise: *Coulter* v. *Crangle* (4), or where both claim and counterclaim arise out of the one transaction and in effect raise the same issue: *Duffy* v. *O'Meara*." (5) Now, looking to see what *Duffy* v. *O'Meara* was, it was a characteristically Irish case. There was a fight, which terminated in a law suit. The plaintiff brought an action, saying that the defendant had

(1) [1921] 2 K. B. 17.
(2) [1922] 2 I. R. 135.
(3) (1907) 42 I. L. T. 24.
(4) (1903) 37 I. L. T. 79.
(5) (1899) 5 I. W. L. R. 147.

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assaulted him, and the defendant counterclaimed, saying that the plaintiff had assaulted him; and it is satisfactory to know that both claims failed. That is given by Andrews L.J. as an example of the case where the claim and counterclaim arise out of the one transaction and the same issue. When I turn back to the judgment of O'Connor L.J., I find that he takes this very case as an example of an action and counterclaim arising out of the same transaction, and he says this (1): "Let me take a case where there is an action for negligence, and a counterclaim for negligence arising out of the same transaction, and both claim and counterclaim are dismissed. The defendant's costs of action are first taxed. Ninety-five per cent. of the brief is taken up with matter that affords a defence to the action, though it is equally relevant to the counterclaim. Shutting his eyes to the existence of the counterclaim, the taxing master gives the entire brief and practically all (if not all) the fees to the defendant as costs of the action. The taxing master now comes to tax the plaintiff's costs of counterclaim. Shutting his eyes to the existence of the action, he finds that ninety-five per cent. of the costs are conversant with the happening of the accident, and therefore attributable to the counterclaim, and he allows practically all the plaintiff's brief and fees to the counterclaim. If this system is adopted, the plaintiff's costs in such a case will equal if they do not amount to more than the defendant's, though it is the plaintiff who, in the words of Lord Lindley (2), has let out the waters of litigation. In my view the taxing master should have found by what amount plaintiff's costs were increased by the counterclaim; he would then allow him, not ninety-five per cent. of the brief, but five per cent." That is to say that where it is the same transaction that the parties are fighting about, and what they are fighting about is the negligence of the two parties in the transaction, the rule as laid down in *Saner* v. *Bilton* (3) applies, and it is not a case for apportionment. It seems to me that that principle, stated by the Lord Chancellor and

(1) [1922] 2 I. R. 124.
(2) An error for Fry J.; see *Saner* v. *Bilton* 11 Ch. D. 419.
(3) 11 Ch. D. 416.

Andrews L.J. and illustrated by O'Connor L.J., covers this case, in which the question who was negligent, which is really what is to be settled in the claim, is also to be settled in the counterclaim. Each side begins by saying: You, the other, were negligent, and the other says: No, it was you who were negligent, and the relevant matter is the same in both claim and counterclaim. That being so, the case seems to me to fall within the principle as stated in the Irish case and to come within the rule laid down by Fry J. in *Saner* v. *Bilton* (1) and adopted by the Court of Appeal in the *Atlas Metal* case (2), from which it follows that the principle adopted by the registrar was right, and that the learned county court judge, in relying on *Christie* v. *Platt* (3), ought not to have disturbed the registrar's taxation. There is no dispute whether the registrar correctly applied the principle to the individual items, but only whether he started with the right principle. To any taxing master or judge who has to deal with the items, I venture to think that the very careful analysis of the various items found in the judgment of O'Connor L.J. (4), beginning with the writ, and going up to the trial, will be found of very great assistance.

For these reasons I think the appeal should be allowed, and the taxing master's taxation adopted.

SARGANT L.J. I am of the same opinion. In this case the claim has failed and the counterclaim has failed, and the natural result is that the plaintiff should pay the defendant the costs of the claim, and, on the other hand, that the defendant should pay the plaintiff the costs of the counterclaim; and that is in accordance with the view of Fry J. in *Saner* v. *Bilton* (1) and of the Court of Appeal in the *Atlas Metal* case. (2) But then comes the question, what are the costs of the counterclaim? In this case, if the matter had been treated solely as a claim and a defence, it would have been necessary for the plaintiff to show negligence on the part of the defendant, and for the plaintiff also to defeat the

(1) 11 Ch. D. 416.
(2) [1898] 2 Q. B. 500.
(3) [1921] 2 K. B. 17.
(4) [1922] 2 I. R. 114.

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defence of the defendant that there was negligence, or contributory negligence, on the part of the plaintiff, and for the purposes of the counterclaim it would be necessary for the defendant to show that the plaintiff had been guilty of negligence, and to defeat the defence that the defendant had been guilty of negligence, and therefore it seems to me that the issues on the claim and the counterclaim are precisely the same. In that state of things, what were the costs of the claim? The costs of the claim were the costs dealing with those two questions of negligence between the two parties. That being so, the defendant is, prima facie, entitled to the whole of the costs of determining those issues. What, on the other hand, are the costs of the counterclaim? With regard to that, Lindley M.R. says this (1): "Next, as to the counterclaim. The defendant has to pay the costs of this, and the counterclaim is to be treated as an independent cause of action, and, to use Lord Esher's words, as if the claim did not exist. (2) This last expression, however, is calculated to mislead, if not explained and properly understood. What are costs of a counterclaim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. The fact that if there had been no action the costs of the counterclaim would have been larger, because the defendant would then have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred, and in considering what the costs of a counterclaim really have been in any particular case, the costs saved by not bringing a cross-action cannot be treated as costs incurred"; and accordingly he held that the only costs to be allowed on the counterclaim were such extra costs as represented the costs due to the existence of the counterclaim.

I will not go into the case which my Lord has referred to, the Irish case (3), because, although I quite agree with his remarks as to the value of that case, it dealt with a great number of propositions the discussion of which is not necessary

(1) [1898] 2 Q. B. 505.
(2) In *Shrapnel* v. *Laing* 20 Q. B. D. 334, 338.
(3) [1922] 2 I. R. 105.

for the decision of the present case. Here it seems to me quite clear that neither party had any right against the other. No litigation ought to have ensued, but the plaintiff, who, of course, gets certain advantages by having the right to begin, commenced the proceedings, and failed in those proceedings, and those proceedings he ought to pay for. On the other hand, the defendant, who might very likely never have commenced any proceedings had he not been attacked, on being attacked put in a counterclaim. It seems to me that the costs he ought to pay are only those extra costs occasioned by the counterclaim he put in in reply to the claim; and only to the extent to which the costs of the proceedings have been increased by the putting in of the counterclaim.

I agree that the decision of the registrar was correct, and that this appeal ought to be allowed.

We have not had the advantage of any argument on the part of the respondent, but the whole series of cases was so carefully put before us by Mr. Thomas, that I think we are almost in as good a position as if we had heard the other side.

Appeal allowed.

Solicitors for appellant: *Rooke & Sons, for Brain & Brain, Reading.*

W. L. L. B.

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Jan. 25, 26, 27, 28, 29; *Feb.* 2, 3, 4, 22.

BROWNING AND OTHERS *v.* CRUMLIN VALLEY COLLIERIES, LIMITED.

[1924. B. 5969.]

Mine—Coal Mine—Unsafe Condition—Refusal of Miners to work—Closing of Mine for Repairs—Right of Miners to claim Wages while Mine closed —Implied Term in Contract of Employment—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *ss.* 36, *sub-s.* 1; 38, 40, *sub-s.* 1; 102, *sub-s.* 8.

The plaintiffs, miners employed by the defendants at their colliery, refused to work in the mine on the ground that it was unsafe owing to the condition of the shafts. By reason of the fall of part of the lining of one of the shafts it had become unsafe, and the other shaft being also unsafe, the plaintiffs refused to go down into the mine until sufficient work had been done to render the shafts safe. The dangerous condition of the shafts was not due to any negligence or breach of duty on the part of the defendants. The mine was closed by the defendants in order to enable them to execute the necessary repairs, and the plaintiffs in consequence sustained a loss of wages. They claimed declarations that the defendants were liable to pay them wages, or alternatively damages, in respect of their loss of wages while they were absent from work by reason of the mine being closed:—

Held, that in order to give effect to the presumed intention of both parties to the contract of employment, it was necessary to imply a term that, in the events which happened, the mineowners should not be liable to pay wages or damages to their workmen during the time which was reasonably required to put the mine into a safe condition.

Held, further, that the defendants were not liable to pay the plaintiffs damages for the breach of any duty imposed on them by the Coal Mines Act, 1911, inasmuch as it was not reasonably practicable for the defendants to prevent the shafts from getting into an unsafe condition, and they were therefore protected by s. 102, sub-s. 8, of the Act.

ACTION tried before Greer J. without a jury.

The following statement of facts is taken from the written judgment of the learned judge:—

"The plaintiffs in this case are six colliers suing on behalf of themselves and all the underground and surface workmen employed by the defendants at their Crumlin Valley Collieries on August 18, 1924. The defendants are the Crumlin Valley Collieries, Ld., the employers of the plaintiffs on that date.

By their statement of claim, the plaintiffs claimed declarations that the defendants were liable to pay to the plaintiffs wages, or, alternatively, damages, in respect of a

loss of wages sustained by them respectively for varying periods of time from August 18, 1924, during which they were absent from work by reason, as they allege, of breaches of contract, or, alternatively, breaches of statutory duty, by their employers, the defendants, and the named plaintiffs claimed payment of the wages or damages to which they are declared to be entitled. The declarations are claimed separately with regard to the period from August 16 to September 22, 1924, during which there was a complete stoppage of work, and for the period subsequent to that date by reason of a partial stoppage which affected some of the named plaintiffs and some of the unnamed plaintiffs.

The right to wages or damages was alleged to arise from : (1.) An implied term in their contract of employment, that the defendants should, during the continuance of the plaintiffs' contract of employment, provide the plaintiffs with work so as to enable them to earn wages ; (2.) An implied term that the defendants should comply with the statutory provisions contained in s. 36, sub-s. 1 ; ss. 38, and 40, sub-s. 1, of the Coal Mines Act, 1911, and regs. 79 and 80 of the General Regulations made under that Act; and (3.) A term in the contract that the defendants would keep and maintain their collieries in good substantial and safe condition and repair so that the plaintiffs could work and continue to work at the said colliery during the continuance of their said contract with the defendants, and they, the plaintiffs, alleged that the defendants failed to perform these contractual duties, and thereby broke their contract and caused to the plaintiffs the damages claimed. They also based their claim for damages on the alleged breach of the statutory duties referred to above.

In their defence the defendants denied that they employed the plaintiffs on the terms mentioned in the statement of claim, and alleged that their contract of employment was subject to an implied condition that if for any reason it became dangerous and unsafe to continue to work the colliery, the plaintiffs should not be entitled to demand work from the defendants during such time as was necessary for executing repairs or alterations undertaken in order to render the

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working of the colliery safe. They put in issue the other material allegations of the statement of claim, and in para. 5 of the reamended defence they relied upon the protection of s. 36, sub-s. 4, and s. 99, sub-s. 4, and s. 102, sub-s. 8, of the Coal Mines Act, 1911.

The material facts, as proved by the evidence, are as follows: The plaintiffs were employed by the defendants at the Hafodyrynys Colliery in various capacities on the terms, so far as they were expressed, of the Conciliation Board Agreement of July 1, 1921. On Saturday, August 16, 1924, an accident occurred by the fall of part of the lining of the west shaft of the mine causing serious injuries to two men. On Monday, the 18th, the miners required the manager to permit an examination to take place of the shaft before they decided whether they would go down into the mine. The report of the examiners was unfavourable, and before the men would resume work they desired the pit to be examined by the district miners' agent. It was so examined, and as the result the men were advised that the shaft was not safe, and accordingly they refused to work. The shaft was examined again on behalf of the men on August 19, 24, 26, 27, and 30, and on several of these examinations Government mining inspectors were present and took part. On the first two occasions the west shaft only was examined, but on the other four occasions the east shaft was also examined. After the last examination, on August 30, the chief inspector of mines, Mr. Walker, after a consultation with two other inspectors who accompanied him, stated his view in a written statement, which he handed to the owners and the miners' agent, and which reads as follows: "Report of H. Walker, chief inspector of mines. (1.) The west pit to be put in order to the satisfaction of Mr. Carey and Mr. Jenkins. (2.) Application for exemption from provisions of s. 36 to be made. No work to be done underground without exemption, the east shaft not being in my opinion an outlet within the meaning of s. 36. H. Walker. 30th August, 1924." A great deal of evidence was called with regard to the condition of the two shafts, and I have come to the definite conclusion,

after full consideration of the evidence, that neither shaft was reasonably safe on and after August 16, and the men were justified in refusing to go down until sufficient work had been done to make them safe. I think that by August 30 the work required to make the west shaft reasonably safe was nearing completion, and that in the course of two days' further work the west shaft was in a reasonably safe condition, though it still required some repairs, which could, in my judgment, be safely done at week-ends. The east shaft was not reasonably safe at any time before the men came back to work on September 22. I find that the unsafe condition of the west shaft was not due to any negligence or breach of duty on the part of the defendants, that such repairs were done from time to time as were reasonably required to keep the shaft in a safe condition, but that the unsafe condition arose from continued and unusual pressure on the lining of the shaft, which had by August 16 brought the shaft into a condition in which it could not be rendered safe or kept safe by repairs from time to time, but that it was necessary that its use should be discontinued and complete and thorough repairs carried out before it could be deemed reasonably safe.

After the examination of the west shaft a request was made on August 24 for the examination of the east shaft, and several witnesses gave an account of its condition. I do not think it necessary to go into detail with reference to the condition of this shaft, but I find as a result of all the evidence that it was in fact not reasonably safe, and that it had been in a dangerous condition for several months before August 18, probably from the early part of January, 1924. This shaft had been subjected to very great pressure by the strata through which the lower part of it passed. The pressure had crushed the inset to the roads at the bottom of the shaft and had greatly constricted the diameter of the shaft, especially that part of it that was below and just above the three-quarter landing. For many years it had required careful watching, and in the year 1920 the mineowners decided, on the recommendation of the manager, to construct at the bottom of the pit a new inset consisting of a concrete wall

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and iron girders of such size and strength as would form not merely a strong and satisfactory inset, but also would afford a strong foundation for the shaft itself. The carrying out of this work involved very great care, and it could only be done safely if done slowly. The work was nearing completion when the mine stopped on August 18 in consequence of the refusal of the men to work. In my judgment, founded upon the evidence, it would have been impracticable and unwise to have started any reconstruction of the shaft lining until after the completion of the foundation. The manager, therefore, wisely contented himself with repairing the portions of the shaft that appeared to threaten danger from time to time, and postponed the work of reconstruction of the lower part of the shaft until after the completion of the inset and foundation. In my judgment the owners were not guilty of any negligence in adopting the methods they did in dealing with a very difficult situation. I think it was inevitable from the date when the work was commenced in 1902 that, as soon as the new foundation and inset were completed it would be necessary to put the shaft out of commission in order to reconstruct the lower part. Unfortunately, this part of the shaft had, in my judgment, become dangerous before the completion of the foundation. I think it had got into this condition by the beginning of the year 1924, but the exact date when it ought to have been put out of commission need not be definitely ascertained. If the defendants had closed their mine for the purpose of reconstructing the lower part of the east shaft at any date earlier than August 18, the mine would have been closed for a longer period than it in fact remained closed at the later date, because it would at the earlier date have taken longer to complete the foundation, and the plaintiffs would have been deprived of work and wages for a longer period of time than they in fact were, by what happened in August."

J. B. Matthews K.C., *A. T. James* and *Ivor Brace* for plaintiffs.
Vachell K.C., *E. W. Cave K.C.* and *Lincoln Reed* for defendants.

Cur. adv. vult.

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Feb. 22. GREER J. [after stating the facts as above set out continued :] I have now to consider the effect of these findings on the plaintiffs' claim for wages, or, in the alternative, damages. The plaintiffs' claim for wages or damages was, in the first place, based on implied terms in their contract of employment. There is undoubtedly an implied obligation on the part of the employers to exercise reasonable care to keep their ways, works, machinery and plant in a safe condition for the men to work. So far from being satisfied that they had failed in this duty, I think the defendants took all reasonable steps to combat the difficulties created by the forces of nature operating on the shafts, and that the shafts got into an unsafe condition notwithstanding the exercise of reasonable care by the defendants and their agents or servants in that behalf, and that therefore the defendants committed no breach of the implied obligation at present under consideration.

It was contended on behalf of the plaintiffs that there was an implied undertaking in the contract with the employers that the defendants would comply with the statutory provisions contained in the sections of the Act above mentioned. In my judgment the contract contained no such implied term. I do not think it would have occurred to any one that it was necessary to make the statutory provisions in question part of the contract. Certain absolute duties and liabilities are expressly imposed on the owners by the statute, and it cannot be assumed that either party, still less both of them, must have intended that they should be part of the contract. It follows that whatever may be the effect of the statute apart from the contract, there was no absolute duty under the contract to comply with the provisions of the sections mentioned in the statement of claim.

What, then, is the position of the workmen faced with an unusual danger such as existed in both shafts on August 18 ? Were they entitled to refuse to work, and if they refused to work were they entitled to their wages ? In order to decide these questions it is necessary to determine whether there was in their contract of employment any implied term which

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would regulate their rights and duties in the events that happened. It must be borne in mind that mining is under any circumstances a dangerous occupation, and that it is generally known that the working of mines is liable to be interfered with and stopped altogether for varying periods of time through damage caused either by negligence of some of the men, or by the forces of nature, which the exercise of reasonable care has failed to cope with. The terms of the plaintiffs' contract of employment so far as they are express are contained in what is called the Conciliation Board Agreement for the Coal Trade of Monmouthshire and South Wales. This in origin was a general agreement between representatives of owners and representatives of workmen in Monmouthshire and South Wales. It had been made part of the plaintiffs' individual contracts of employment by having their signatures attached to it in a book kept by the defendants. It contains no provisions expressly applicable to the circumstances of the present case. It provides in cl. 25 that all notices to terminate individual contracts shall be a fourteen days' notice; but as to what is to happen when the workman is unable to work and the employer is unable to provide work without any default on either side the written agreement does not say. The consideration for work is wages, and the consideration for wages is work. Is it to be implied in the engagement that the wages are to be paid when through no fault of the employer the work cannot be done? The principle that ought to guide the Court when asked to say whether any term should be read by implication into a written contract was stated by Bowen L.J. in *The Moorcock* (1), and his words have ever since been accepted as the guiding principle. In any case in which it is necessary to ascertain whether any and what term should be implied in a written contract the correct application of this guiding principle has to be determined. Bowen L.J. said: "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the

(1) (1889) 14 P. D. 64, 68.

presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

It seems to me that there must in the circumstances of the present case be some implied term. The men did not work, they were not ready and willing to work in the state the mine was in, and the agreement is silent on the question whether they are in these circumstances entitled to be paid wages. Were the mineowners to bear "all the chances of failure" due to the operation of natural forces without any fault on their part? Were the perils of the transaction in that event to be all on one side, or must the consequences be divided between the two parties, the employers losing the advantages of continuing to have their coal gotten and being compelled to undertake expensive repairs, and the men on their part losing their wages for such time as was reasonably required to put the mine into a safe condition? The latter, I think, must be presumed to have been the intention of both parties. I am satisfied that no employer would have consented to agree that the workmen should be free to

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withhold their work if the mine became dangerous through no fault on his part and yet should be entitled to be paid their wages. I think the employer would only have agreed to the workmen's right to withhold their labour under these circumstances, subject to the condition that they should not be entitled to their wages. Further, it seems to me clear from the way in which the present case was conducted, and from the evidence given by several witnesses, that this was the usual understanding of the effect of the men's contract of employment.

Mr. Matthews, for the plaintiffs, at one period of the case admitted that if a mine was stopped through accident for which the owners were not responsible, the miners would not be entitled to their wages. But the admission was made inadvertently and was withdrawn, and I attach no importance to it, but I do attach importance to what the witnesses said, and to the fact that though the point was made quite clearly by Mr. Vachell and Mr. Cave in cross-examination, not a single witness for the plaintiffs gave any evidence inconsistent with the view of the contract suggested in cross-examination, and either accepted or not disputed by the witnesses to whom it was put.

The view I take of the nature of the implied term in the contract seems to be fatal to the plaintiffs' claim on the contract, whether the claim is for wages or for damages. Mr. Matthews, however, contended that having regard to the decided cases it was impossible in a contract of employment to draw the inference that there was such an implied term, and cited a number of authorities in support of this contention. Most of these authorities dealt with claims by sailors for their wages. The sailors' cases relied on are as follows: *Burton* v. *Pinkerton* (1); *O'Neil* v. *Armstrong, Mitchell & Co.* (2); *Austin Friars Steam Shipping Co.* v. *Strack* (3); *Caine* v. *Palace Steam Shipping Co.* (4); and *Liston* v. *Owners of Steamship Carpathian.* (5) In all these cases,

(1) (1867) L. R. 2 Ex. 340.
(2) [1895] 2 Q. B. 70.
(3) [1905] 2 K. B. 315.
(4) [1907] 1 K. B. 670.
(5) [1915] 2 K. B. 42.

except the last, it was held that though the plaintiffs had not served during the whole of the voyage contracted for they were entitled to recover their wages, because the owner had by his own act changed the character of the voyage, and substituted one which the plaintiffs were entitled to refuse to take part in, as it was not the voyage intended by the contract. They are none of them cases in which, without any fault of the owner, it had become impossible, either temporarily or permanently, to continue the agreed voyage. They do not go far enough even in the case of a seaman's contract to establish the proposition that where the voyage becomes impossible through no fault of the owner the men are entitled to their wages. Indeed it has been finally decided that if performance of the contractual voyage be prevented by some cause which is likely to last a long but indefinite time, both sides are released from their bargain, and the seaman cannot recover wages in respect of any of the time when it has become impossible for him to continue to serve: see *Horlock* v. *Beal*. (1)

The decision of Lord Coleridge in *Liston* v. *Owners of Steamship Carpathian* (2) affords no light on the question I have to decide. That was a case where by frustration of the adventure the contract was dissolved, and it was held that the seamen and the captain were in a position to make a new binding contract, and that the contract made with the men by the master was within the master's authority.

There are, however, three cases with regard to seamen that were not cited to me which appear to be in point unless they are distinguishable on the ground that the seamen's contract is a very special kind of contract to which different considerations apply from those which affect other kinds of employment. The cases referred to are *Beale* v. *Thompson* (3); *Pratt* v. *Cuff* (4); and *Delamainer* v. *Winteringham*. (5)

These cases show, at any rate on the law as it stood at

(1) [1916] 1 A. C. 486.
(2) [1915] 2 K. B. 42.
(3) (1804) 4 East, 546.
(4) Cited 4 East, 43.
(5) (1815) 4 Camp. 186.

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the date when they were decided, that if a seaman's engagement be interrupted by detention of the ship and crew by causes beyond the control of either the seaman or the owner, and the interrupted voyage be resumed even after a delay of six months, the seaman is entitled to his wages for the whole period from the beginning of the voyage to its completion, including the stipulated amount per month while he was detained by circumstances beyond the owner's control. They were decided at a time when the doctrine that freight is the mother of wages prevailed, and when the main consideration for the wages of the seaman was considered to be that he thereby enabled freight to be earned. Assuming, however, that the law applied in those old cases still applies to a seaman's right to wages, it does not follow that the same rule applies to a contract between a workman at a colliery and his employers. A seaman's contract is usually for a voyage, or, if not, then for some prolonged period of time, and it cannot be determined by notice. From the nature of the case, interruptions of the voyage and/or the services of the seaman are frequent, and the seaman has not the opportunity of putting an end to his engagement by notice. If he leaves the ship before the end of the voyage contracted for, he is liable to be prosecuted for desertion. It may well be that under these circumstances it is still the law that a seaman is not disentitled to his wages during the time when, through some external cause for which neither he nor the shipowner is responsible, the voyage is interrupted, if the interruption is only temporary and the voyage is resumed. But, in my judgment, the circumstances relating to a workman's engagement to work on or in a coal mine are so different from those of a seaman that no inference can be drawn from decisions as to a seaman's contract in a case concerned with a coal worker's contract.

The only other cases I need refer to when considering the claim so far as it is based on contract are *Cuckson* v. *Stones* (1); *Hanley* v. *Pease & Partners* (2); and *Devonald* v. *Rosser & Son.* (3) In *Cuckson* v. *Stones* (1) the defendant engaged

(1) (1858) 1 E. & E. 248. (2) [1915] 1 K. B. 698. (3) [1906] 2 K. B. 728.

the plaintiff to serve him as a brewer for ten years. In consideration of "due, full and complete service" by the plaintiff, the defendant promised to pay the sum of 20*l.* on execution of the agreement, to furnish the plaintiff with a house and coals during the whole of the said term of ten years, and to pay him the weekly sum of 2*l.* 10*s.* during the said term. The plaintiff fell ill and was ill for six months and unable to attend to his duties, but during that time was supplied with house and coal as agreed, and, when required, advised the defendant as to the carrying on of his business. Though the defendant did not discharge the plaintiff but treated the contract as continuing, he suspended the payments for the last few months of the plaintiff's illness. The Court held that a plea that plaintiff was not ready and willing to serve was a good answer to plaintiff's claim, if proved, but it meant that "he voluntarily and wilfully refused or omitted to serve," and that the plaintiff was entitled to recover. Lord Campbell C.J. said: "The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work." The contract was a very special one, and it seems to me the decision does not apply to the facts of the present case.

Hanley v. *Pease & Partners* (1) decides that if a workman misconducts himself but the employer does not discharge him, the employer cannot keep him to his contract and dispense with his services for a day as a punishment. In that case the suspension was the voluntary act of the employer, and was not caused by circumstances beyond his control. That case has no bearing on the question raised by the present case.

Great reliance was placed by Mr. Matthews on the decision in *Devonald* v. *Rosser & Son* (2), but in that case the defendant's failure to provide work for the plaintiff so as to enable him to earn his piecework pay was due to the employer deciding that owing to bad trade it would pay him better to close down. It was not due to a cause over which he had no

(1) [1915] 1 K. B. 698. (2) [1906] 2 K. B. 728, 740, 742.

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control, it was neither illegal nor impossible for him to continue to find work for the plaintiff, and the Court expressly left open the question whether the plaintiff could have succeeded if the stoppage had been due to such a cause, indicating, I think, that they inclined to the opinion that he could not: see per Lord Alverstone C.J. and per Sir Gorell Barnes, President, where the learned President uses these words: "I can quite understand that, having regard to a certain set of circumstances, such as breakage of machinery, it may be reasonable to hold that it was the intention of the parties that those risks should be shared, that risks of that character which are known to both parties, and which prevent both from doing what was contemplated, should excuse from the obligation to maintain the continuance of the work." I think these observations apply a fortiori to contracts between mineowners and their workpeople.

The conclusion I draw from a perusal of the authorities is that there is no case which decides that as a matter of law I cannot infer that there was implied in the plaintiffs' contract such a term as I have stated above. For reasons already stated, I am of opinion that in this case the contract was subject to such an implied term. It is true that the defendants committed a breach of their implied obligation to exercise reasonable care to maintain the shafts in a reasonably safe condition when they continued to employ the workmen in the mine after the east shaft became unsafe at the beginning of 1924. But the plaintiffs' loss of wages was not due to the postponement of the necessary work till after the stoppage in August. If the mine had been stopped in January and kept closed until the needed work of reconstruction was completed, the plaintiffs' loss of wages would have been more serious than it was. The postponement of the work, so far from causing loss to the plaintiffs, in fact diminished the loss sustained by them by their rightful refusal to work in August and September.

The claim for damages for breach of statutory duty can be shortly dealt with. No doubt ss. 36, 38, and 40 of the

Coal Mines Act, 1911, imposed on the defendants absolute duties, the breach of which followed by damage would give the plaintiffs a good cause of action without proof of negligence, but there are several defences to this claim: (*a*) The safety of the plaintiffs was not, in fact, interfered with by the breach. No personal injuries were suffered by any of them, and so far as the claim for loss of wages is concerned, it is successfully met by the implied term in the contract of employment which I have already held to be part of their contract. (*b*) The damages were not due to breach of the defendants' statutory duty. The duties imposed by the statute only apply to mines while they are being worked. The statutory provisions may be paraphrased by saying that the statute imposes on the mineowners a duty not to employ men in their mine when it is not in the state required by the statute. The statute does not mean that the owners are under an absolute obligation to secure that their mine will never get into a condition of unsafety. It merely secures that they are not to risk the safety of their employees by working the mine when it has failed to comply with the requirements of the Act directed to securing their safety. The damages in this case were caused not by the breach of duty, but by the stoppage of the mine while the defendants were fulfilling their statutory duty to restore the mine to the condition required by the statute. It is true they postponed this duty longer than they should have done, but, as already pointed out, the men did not lose anything by reason of this postponement, but, on the contrary, gained by it. (*c*) I find upon the evidence that it was not reasonably practicable for the owners to have prevented the shafts from getting into an unsafe condition, and they are, therefore, protected by s. 102, sub-s. 8, of the Coal Mines Act, 1911. The only practicable method of dealing with the consequences of unusual pressure on the shafts was, in my judgment, to repair from time to time defects as they arose, and so to keep the shafts reasonably safe until the time came when such repairs as could be done while the mine was in work were no longer adequate to that end, and in the meantime to proceed with the strengthening of the foundation

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of the east shaft, then to close the mine, reconstruct the lower part of the east shaft, and thoroughly repair the whole of the west shaft. This the defendants did, and though, in my opinion, they formed a wrong judgment as to the safety of the shafts and should have closed the mine earlier than it was in fact closed, the real cause of the plaintiffs' loss of wages was the unsafety of the shafts, which it was not practicable to prevent, and not the postponement of complete repair and reconstruction.

For these reasons the plaintiffs' claim fails in all its branches, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Smith, Rundell, Dods & Bockett, for T. S. Edwards & Son, Newport.*

Solicitors for defendants: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

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Feb. 23; *March* 18.

COHEN *v.* SELLAR.

[1925. C. 908.]

Contract—Marriage—Engagement Ring—Right to Return of Ring.

If a man who has promised to marry a woman, and has given to her an engagement ring in contemplation of marriage, refuses without legal justification to carry out his promise, he cannot demand the return of the engagement ring:—

Semble, if a woman who has received an engagement ring in contemplation of marriage refuses to fulfil the conditions of the gift and to carry out her promise, she must return the ring.

Semble, if an engagement to marry be dissolved by mutual consent, then in the absence of an agreement to the contrary the engagement ring and like gifts must be returned by each party to the other.

FURTHER consideration of an action tried before McCardie J. and a common jury.

The following statement of facts is taken from the judgment:—

"The plaintiff, Miss Cissie Cohen, aged twenty-four, had

been engaged in business, and was a young woman of obvious ability. The defendant, Nathan Sellar, aged twenty-seven, occupied a clerical post at a moderate weekly salary. Each belonged to the Jewish faith. In August, 1923, they agreed to marry, and in December, 1923, the defendant handed to the plaintiff a single-stone diamond ring worth 30*l*. No express condition accompanied the delivery of the ring. It was, however, admittedly given and received as an engagement ring in contemplation of marriage.

Unhappy differences soon arose between the two. Each had a quick temper, and quarrels were frequent. So acute became the state of affairs that in June, 1924, the parties went before a Jewish tribunal in order to secure, if possible, an adjustment of the strife, but no reconciliation was achieved. Matters reached a climax in December, 1924. The mutual asperities were then most pronounced, and the two did not meet after that date. The plaintiff asserted that in that month the defendant refused to marry her. The defendant, on the contrary, asserted that it was the plaintiff herself who, with emphatic words, broke off the engagement. Apart from damages the substantial question for the jury was which of the two had refused to marry. The jury found that it was the defendant and not the plaintiff who had refused to carry out the promise. They awarded the plaintiff 34*l*. 10*s*. as special damages in respect of certain items claimed by her, and 40*l*. as general damages for the loss of the marriage. Few will doubt that the act of the defendant in ending the engagement saved both parties from an unhappy married life. There was no suggestion of any breach of morality between the two. The defence contained no plea of legal justification for breaking off the engagement.

In the course of the trial the question arose which of the two litigants was entitled to the engagement ring. An action had been brought in the county court by the defendant to recover back the engagement ring from the plaintiff. The county court judge adjourned the hearing to await the decision of the High Court action. Then the county court action was removed to the High Court and was made a

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counterclaim in the proceedings before the jury and myself."

The question whether the defendant was entitled to recover back the engagement ring was adjourned for further consideration. The jury in giving their verdict expressed the view that the plaintiff ought to return the ring.

S. Lincoln for the defendant. The defendant is entitled to the return of the engagement ring. An engagement ring is a conditional gift, which is given as a token of marriage, and the property in the ring does not pass to the recipient of the ring unless and until the condition subsequent—namely, the marriage—has been performed. In *Young* v. *Burrell* (1) a gold pomander, which had been given as a token of marriage, was ordered to be returned, as the marriage had not taken place. In *Oldenburgh's Case* (2), according to the report in 2 Mod. Rep., North C.J. cited a case in which a person, intending marriage with a lady, presented her with a jewel, and afterwards, the marriage not taking effect, brought an action of detinue against her; and "the Court was of opinion that the property was not changed by this gift, being to a specifical intent." According to the report in Freeman's Rep. the Court said the lady "ought to restore" the gift, "though it were on the man's side, because it was causa matrimonii prælocuti." Where an engagement to marry is broken off presents given conditional on the marriage taking place are returnable, as the property in them does not pass. The principle is well stated in the headnote to *Jacobs* v. *Davis* (3) as follows: "When an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off." The older cases were not cited to Shearman J. *Jeffreys* v. *Lack* (4) was decided by Bray J. upon the same principle. There a present given by the parents of the lady in contemplation of marriage was held to be recoverable on the marriage

(1) (1576) Cary's Causes in Ch. 77; 21 Eng. Rep. 29.

(2) (1676) Freeman's K. B. 213; 2 Mod. 140; 86 Eng. Rep. 988; 89 Eng. Rep. 151.

(3) [1917] 2 K. B. 532.

(4) (1922) 153 L. T. Newspaper 139.

being broken off. An engagement ring is returnable by the lady, even though she is prevented from fulfilling the condition through no fault of her own. *Robinson* v. *Cumming* (1) is distinguishable, as Lord Hardwicke was there dealing with gifts made with a view of introducing a person to a lady, and not with presents made to a lady with a view of marriage. If a man breaks off an engagement and recovers back the ring the lady is entitled to recover damages for the breach of contract, which may include the value of the ring. In the present case the jury awarded the plaintiff 40*l.* as general damages, besides giving her special damages, and it must be assumed that they were taking into contemplation the return of the ring, because they expressed the view that the plaintiff ought to return the ring.

Miss C. M. Young for the plaintiff. The two early cases of *Young* v. *Burrell* (2) and *Oldenburgh's Case* (3) do not support the contention of the defendant, because it does not appear from the reports of those cases whether the man or the woman broke off the engagement to marry. The expression of opinion by North C.J. in *Oldenburgh's Case* (3) was a mere obiter dictum. The headnote in *Jacobs* v. *Davis* (4) is not borne out by the judgment of Shearman J., who in the course of his judgment said (5) that an engagement ring "still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant broke off the engagement. She did break the contract, and therefore must return the ring." That case is no authority for the contention that if the giver of an engagement ring breaks off the engagement he can claim the return of the ring. In

(1) (1742) 2 Atk. 409.
(2) Cary's Causes in Ch. 77; 21 Eng. Rep. 29.
(3) Freeman's K. B. 213; 2 Mod. 140; 89 Eng. Rep. 151.
(4) [1917] 2 K. B. 532.
(5) Ibid. 533.

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that case it was the lady who broke the contract and who was therefore held liable to return the ring. If the defendant is held to be entitled to recover the ring after he has broken off the engagement he will be allowed to profit by his own wrong and breach of contract. That would be contrary to the policy of the law. It is admitted that if an engagement to marry is broken off by mutual consent the engagement ring ought to be returned because it is a conditional gift. An engagement ring is a pledge, and ought to be governed by the ordinary rules with regard to a pledge. If the pledgor breaks the conditions of the pledge the pledgee is entitled to sell the pledge. A deposit on the sale of land is forfeited if the sale goes off through the default of the purchaser who pays the deposit. There is no difference in principle between the forfeiture of a deposit and the present case. The plaintiff is therefore entitled to retain the ring. The expression of opinion on the part of the jury that the plaintiff ought to return the ring is not binding and ought not to affect the result.

S. Lincoln replied.

Cur. adv. vult.

March 18. McCARDIE J. read the following judgment: The questions for my decision emerge from a breach of promise action tried before me with a common jury. I am indebted to each of the counsel for their learned and able arguments. A few facts can be stated. [His Lordship stated the facts set out above and continued:] Both counsel requested that I should, after the jury had given their verdict on the other questions in the case, determine the points of law with respect to the ring. Hence their arguments on a later day before me.

The contentions raised by Mr. Lincoln on behalf of the defendant are of legal interest on ever recurring and practical questions to those who embark on the currents of matrimonial stipulations. In substance he contends that, inasmuch as the ring was given solely in contemplation of marriage, it was an implied condition that if the marriage, through

whatsoever cause, did not take place the ring should be handed back to the defendant. Hence he submitted that it was immaterial that it was the defendant himself who broke the engagement. Miss Young, for the plaintiff, submitted that there could be no implied condition which would allow a person to take advantage of his or her own default. Each counsel admitted that the ring was given subject to some implied conditions. The question is what are the conditions to be implied ?

It is curious that, after the centuries in which so many engagements to marry have been made in hope, but dissolved in disillusion, the questions now before me have not been long ago determined by direct decision.

The matter must be considered, I feel, in at least three aspects—namely : (1.) the old authorities ; (2.) the recent cases which indirectly bear on the matter ; and (3.) the general principles of modern law. I take the old authorities first. To give them a just appreciation it will, I think, be desirable to mention briefly in the course of my judgment the differences between the law of promise of marriage as it was in former times and the law as it seems to be to-day. I will first refer to the two old cases which counsel for the defendant found mentioned in vol. xxv. of that excellent publication, The English and Empire Digest.

The first of the two cases is *Young* v. *Burrell.* (1) There the plaintiff, Young, sued for the return of a gold pomander, " left " (as the report says) with the female defendant " as a token at such time as he was a suitor for marriage " with her. Apparently the lady defendant after receiving the pomander from the plaintiff had married another man. The Court ordered that the pomander should be returned to the plaintiff. It is not clear that there had been an actual promise to marry, but at all events the Court did not consider whether it was the plaintiff or the lady defendant who broke off the engagement. The defendant apparently confessed her liability to hand back the pomander, and I assume that it was she who desired to escape marriage with the plaintiff.

(1) Cary's Causes in Ch. 77 ; 21 Eng. Rep. 29.

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The case is of interest as showing that in 1576 gifts other than engagement rings might be impliedly conditional on marriage. I may say that in 1576 Sir Nicholas Bacon was the Lord Keeper and Sir William Cordell Master of the Rolls.

The second of the two old decisions is *Oldenburgh's Case.* (1) The action was for debt. The actual decision appears to have been that the Court would not allow the defendant in the case to "wage his law without bringing sufficient compurgators to swear that they believed he swore truth." In the course of the argument, however, North C.J. made several observations which bear on the point now before me. There are two reports of the case. They are not identical in language. The statement of North C.J. as given in 2 Mod. 141 is that "he knew where a person of quality, intending a marriage with a lady, presented her with a jewel; and the marriage not taking effect, he brought an action of detinue against her, and she taking it to be a gift offered to wage her law; but the Court was of opinion that the property was not changed by this gift being to a specifical intent, and therefore would not admit her to do it." Mr. Lincoln, however, naturally invoked the language of the report as given in 2 Freeman, 213, which is as follows: "North cited a case in the King's Bench, where a man courted a lady, and had presented her with several jewels, and after, the match breaking off, he brought a detinue for the jewels, and she offered to wage her law; and the Court did admonish her, that, if she had not restored them, she ought not to wage her law; for she ought to restore them, though it were on the man's side, because it was causa matrimonii prælocuti."

The last-quoted words of North C.J. certainly seem to favour the contention of Mr. Lincoln for the present defendant. They suggest that a gift presented solely in contemplation of marriage is to be deemed subject to the broad and overriding condition that, should marriage not take place, whether through the refusal of the man or not, his gift is to be returned. Before, however, deciding the weight now to be given to the apparent views of North C.J. in the time of Charles II., it is

(1) Freeman's K. B. 213; 2 Mod. 140; 89 Eng. Rep. 151.

well to make reference to the law of promise of marriage as it stood in former days.

In *Finlay* v. *Chirney* (1) Bowen L.J. said: "Before the Reformation no action for breach of promise could be maintained, for marriage was a matter of spiritual jurisdiction. It was not till the middle of the 17th century that marriage was recognized by our law as a temporal benefit, and a breach of promise of marriage as cognizable by the temporal Courts: *Baker* v. *Smith* (2); see also Rolle's Abridgement, Tit. Action on the Case, fol. 22, para. 20; *Hebden* v. *Rutter* (3); and *Harrison* v. *Cage* (4), a case supposed erroneously by Willes J. in *Smith* v. *Woodfine* (5) to be the earliest recorded case of an action for breach of promise of marriage. No authorities of a very early date can accordingly be expected to throw light upon the question" before us (i.e., as to whether an action for breach of promise of marriage will lie against the personal representatives of the promisor), "and it must be solved mainly upon principle."

Those words of Bowen L.J. illustrate the manner in which law may develop. It is a striking circumstance of the past that until Lord Hardwicke's Act (26 Geo. 2, c. 33) was passed in 1753 the Church had the power to order specific performance of a promise to marry. The ecclesiastical judgment was rigorous and significant. The words used were these: "Sentence for matrimony, commanding solemnization, cohabitation, consummation, and tractation, as becometh man and wife to have": see 2 & 3 Edw. 6, c. 23, s. 2 (1548). The promise to marry might also be enforced by the process of ecclesiastical excommunication. But though the ecclesiastical power was great yet it was tempered by a more liberal view than exists to-day with respect to the wider purposes of a legal union between man and woman. In the seventeenth century the law recognized that married happiness depended in large measure on compatibility of temper and on the possession by each party of qualifications for a beneficent

(1) (1888) 20 Q. B. D. 494, 504, 505.
(2) (1651) Styles, 295.
(3) (1664) Sid. 180.
(4) (1698) Carthew, 467.
(5) (1857) 1 C. B. (N. S.) 660, 667.

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union of lives. In the period of which I speak a formal marriage contract was described as a "spousals" (sponsalia), and a vivid light is thrown on the matter by a treatise on spousals published in 1686 by the famous and learned Mr. Henry Swinburne. On p. 1 of the treatise he refers to the "signification of love gifts and tokens of the parties betroathed; as bracelets, chains, jewels and namely the ring," which he says "are often used for the very arrabo or assured pledge of a perfect promise." In sect. 18 of the work he sets out thirteen grounds on which promises to marry might properly be dissolved. Amongst them No. 8 is this—namely: "When some deadly enmity and unquenchable hatred is sprung up between the parties affianced." Ground No. 11 is this: "When the one party is so severe and cruel as the other dare not proceed in the match," and also ground No. 13—namely: "Generally whensoever there is just and reasonable cause." It is obvious therefore that in the seventeenth and eighteenth centuries it was legally permissible for a man or woman to break off an engagement to marry for reasons which, unhappily, would not constitute a valid legal excuse to-day. The dicta in *Oldenburgh's Case* (1) must be considered in the light of what I have just ventured to state.

The general state of the law as it is to-day may be inferred if I extract a few lines from Halsbury's Laws of England, vol. xvi., p. 276. They are these: "It is no defence to an action for breach of promise of marriage that, previously to the promise, the plaintiff, without the defendant being aware of it, had been insane and confined in a lunatic asylum"; and, again: "No disease or infirmity, short of absolute incapacity on the part of the defendant, will avail him or her, even if it is proved that the performance of conjugal duties would endanger his or her life." The decisions are there collected and are modified but little (if at all) by the case of *Jefferson* v. *Paskell*. (2) The law of breach of promise grew at a period when the principles of eugenics were scarcely known and when the lamps of sociological science had not

(1) Freeman's K. B. 213; 2 Mod. 140. (2) [1916] 1 K. B. 57.

been lit. A striking illustration of the views of marriage which exist to-day among a section of the community is afforded by the facts of the present case. The plaintiff herself expressly stated in her evidence that the defendant was "very bad tempered, a person of no principles, and not a man of his word," and yet, she added, "I was anxious to marry him."

Apart from the difference between the social conceptions of 250 years ago and those of to-day, it must be recalled that it is only within comparatively recent times that the law of contract has been fully developed, and that actions for breach of promise have been clothed with the more obvious features of commercial disputes.

I now desire to mention another old decision not cited by counsel to me. It is *Lockyer* v. *Simpson.* (1) The case is one of interest because of the lucid argument of the Attorney-General (Sir Philip Yorke, Kt.) and the Solicitor-General (Chas. Talbot, Esq.) with respect to gifts made in contemplation of marriage. There a Mr. Tolson had given several valuable articles (including a diamond necklace) to a lady to whom he was affianced. Unhappily Mr. Tolson died on the morning of the day for which the wedding was fixed. The point for decision by the Master of the Rolls (Sir Joseph Jekyll) was whether the gifts were absolute or conditional. In the exceptional circumstances disclosed he held them to be absolute. Mr. Tolson had been a close friend of the family of the lady for many years and had apparently also formed an admiration for her from the time she was an infant.

So matters stood in 1730. The influence of Roman law on English common law doctrine was still great, and it is worth while to refer briefly to the law of Rome on the questions before me. Actions for breach of promise of marriage were not allowed by Roman law, and that has been adopted in substance by modern Continental nations. The obligation imposed by the Roman betrothal (sponsalia) was a moral and not a legal one. It might of course be mutually dissolved. But it might also be repudiated by either party.

(1) (1730) Mosely, 298.

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If mutually dissolved the betrothal gifts (arrhæ sponsalitiæ) were to be returned by each party. This I may add is at present the law provided by the Civil Code of Germany, cl. 1301, and the Code of Switzerland, cl. 94. If a Roman betrothal was repudiated without cause the party at fault forfeited the betrothal gifts or any present of money. If the woman was the offending party she had, ordinarily, to return not only the betrothal gift, but also its value in money: see Prof. Sherman's Roman Law in the Modern World, vol. ii., pp. 45–6, and Buckland's Text Book of Roman Law, p. 112.

I ought perhaps, ere I refer to the modern decisions, to mention the case of *Robinson* v. *Cumming*. (1) The gifts there in question were not betrothal gifts in the ordinary sense. The judgment of Lord Hardwicke, however, is relevant to the matter now before me. He said: "If a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him: but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risks and loses by the attempt, he must take it for his pains." It is not necessary that I should seek to analyse Lord Hardwicke's judgment. I need say only that it shows the extent to which the law will imply conditions so that justice may be done.

I now turn to the two recent cases which bear on betrothal gifts. In neither of them was any reference made to *Young* v. *Burrell* (2), or *Oldenburgh's Case* (3) or *Lockyer* v. *Simpson* (4).

First I take *Jacobs* v. *Davis*. (5) The headnote is as

(1) (1742) 2 Atk. 408.

(2) Cary's Causes in Ch. 77; 21 Eng. Rep. 29. 140.

(3) Freeman's K. B. 213; 2 Mod.

(4) Mosely, 298.

(5) [1917] 2 K. B. 532.

follows : " When an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off." This broad statement seems to favour Mr. Lincoln's argument before me. But the headnote must of course be read with the actual judgment of Shearman J. He was dealing with a case where the lady broke off the engagement, and the man thereupon sued for the return of the engagement ring. In the course of his decision Shearman J. said (1) : " Though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant " (i.e., the lady) " broke off the engagement. She did break the contract, and therefore must return the ring." It seems reasonably clear that Shearman J. impliedly held that if the plaintiff himself had broken off the promise he could not get back the ring. This too, I infer, would have been the opinion of Bray J. : see the words of his decision with respect to wedding gifts in *Jeffreys* v. *Lack*. (2)

Such are the decisions. The principles involved are illuminated by the arguments in the already cited case of *Lockyer* v. *Simpson*. (3) It was conceded by the Attorney-General in that case that if the lady had refused to marry the man she must return the gifts delivered to her in contemplation of marriage.

This I hold to be the correct legal view. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So, on the other hand, I think that if the man has, without a recognized legal justification, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring. It matters not in law that the repudiation of the promise may turn out to the ultimate

(1) [1917] 2 K. B. 533. (2) 153 L. T. Newspaper, 139.
(3) Mosely, 298.

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advantage of both parties. A judge must apply the existing law as to the limits of justification for breach.

The conclusions I have stated are I think borne out by the general body of opinion. The apparent dictum to the contrary in *Oldenburgh's Case* (1) cannot be relied on at the present day.

By the slow growth of decisions the promise of marriage is to-day fixed with many of the legal characteristics of a commercial bargain. It is governed largely by the principles of law applicable to ordinary contracts. The conditions which attach to a gift made in contemplation of marriage must be viewed in relation to the incidents which flow from the engagement itself. It is therefore appropriate to quote the words of Lord Sumner in *Bank Line* v. *Capel* (2) where, speaking of a commercial adventure, he said: "Reliance cannot be placed on a self-induced frustration." The like rule will, I think, apply to a matrimonial adventure also. So too Lord Finlay L.C. said in *New Zealand Shipping Co.* v. *Société des Ateliers et Chantiers de France* (3): "It is a principle of law that no one can in such a case take advantage of the existence of a state of things which he himself produced": see also *Mackay* v. *Dick.* (4)

A like result to that I have already stated will follow if an engagement ring be regarded as a pledge or deposit for the fulfilment of a contract. A person who wrongly refuses to carry out a bargain will lose his deposit: see *Ex parte Barrell* (5) and *Howe* v. *Smith.* (6)

I have thought it best to deal with the matter somewhat fully, as it was so adequately argued before me. I may therefore venture to add a few words on other aspects of the matter which may arise and which were referred to by counsel. If the engagement to marry be dissolved by mutual consent, then in the absence of agreement to the contrary, the engagement ring and like gifts must, I think, be returned by each party to the other. This seems clear on principle.

(1) Freeman's K. B. 213; 2 Mod. 140.
(2) [1919] A. C. 435, 452.
(3) [1919] A. C. 1, 6.
(4) (1881) 6 App. Cas. 251, 264.
(5) (1875) L. R. 10 Ch. 512.
(6) (1884) 27 Ch. D. 89.

If the marriage does not take place either through the death of, or through a disability recognized by law on the part of, the person giving the ring or other conditional gift, then I take the view that in such case the condition is to be implied that the gift shall be returned. For although, as I have said, such a gift cannot be dissociated from the engagement to marry, yet I think that in the circumstances of betrothal gifts there should be no application of the operation of such decisions as *Krell* v. *Henry* (1) and *Chandler* v. *Webster*. (2) If the marriage actually takes place then the engagement ring or like gift will, in the absence of express agreement to the contrary, become, I infer, the absolute property of the recipient, and that property will not, I presume, be divested by subsequent divorce.

The judgment I have given does not, of course, touch gifts which, as in *Lockyer* v. *Simpson* (3), are absolute and free from condition. It touches conditional gifts only.

I must add just a word on another point. The jury, after giving their verdict, expressed a view that the plaintiff, Miss Cohen, should return the ring to the defendant. But the matter was not left to them for decision and their view was only a suggestion. They were not cognizant of the points involved in the dispute as to the ring. In any event it would have been right that the plaintiff should keep possession of the ring so that she might be able to take it in execution for the damages and costs awarded in her favour against the defendant.

For the reasons given there must be judgment for the plaintiff with costs on claim and counterclaim.

Judgment for plaintiff.

Solicitors for plaintiff: *H. M. Meyler & Co.*
Solicitor for defendant: *S. W. Digby.*

(1) [1903] 2 K. B. 740. (2) [1904] 1 K. B. 493.
(3) Mosely, 298.

R. F. S.

C. A.

1925

Nov. 24, 25; *Dec.* 15.

[IN THE COURT OF APPEAL.]

MARTIN *v.* LOWRY (INSPECTOR OF TAXES).

MARTIN *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Excess Profits Duty — Income Tax — Purchase and Resales — Speculation lasting less than a Year—"Trade or business"—"Annual profits or gains"—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38 *—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.*

"Annual" profits or gains arising or accruing from any trade and brought in to charge by Sch. D 1 (*a*) (ii.) and Cases I. and VI. include not only recurrent yearly profits or gains, but also profits or gains which arise, accrue or occur in the year of assessment without any characteristic of recurrence in other years.

A wholesale machinery merchant purchased from the Government their surplus stock of aircraft linen under a contract which provided that he should take delivery of the whole within six months. In order to dispose of the linen, he rented an office in London and set up a large and skilled organization by means of which he disposed of his entire purchase in some seven months:—

Held (affirming Rowlatt J.), that he was carrying on a trade or business for the purpose of realizing profits or gains, and was liable as well for excess profits duty as for income tax.

Ryall v. *Hoare & Honeywill* [1923] 2 K. B. 447 approved.

THESE were appeals from two judgments of Rowlatt J. confirming the decision of the Commissioners in two appeals by the appellant Martin against assessments upon him in respect of income tax under Sch. D, and of excess profits duty under s. 38, sub-s. 1, of the Finance Act (No. 2), 1915.

In June, 1919, the appellant agreed to purchase the whole of the surplus stock of Government aircraft linen amounting to nearly 45,000,000 yards. The contract provided that he was to take delivery of the whole stock within six months from June 18, 1919; to pay cash with each order for delivery; and to pay on December 18, 1919, for the balance undelivered at that date.

Failing to dispose of his purchase in one bulk sale, as he originally intended, the appellant set up a large and skilled organization for disposing of it in smaller quantities, and for that purpose rented an office at 95 High Holborn from the beginning of July, 1919, until March, 1920. In the

result some fifty-five wholesale firms in Belfast purchased nearly 35,000,000 yards; 208 export firms purchased another 5,000,000 yards, and the remainder was sold to 1017 retail firms. The appellant's wages bill totalled 7000*l.*; the commission paid on the sales exceeded 20,000*l.*; and the cost of packing the parcels was 17,248*l.* In some seven months he disposed of the whole of the linen purchased by him.

The appellant's calling was that of a merchant engaged in the business of wholesale machinery under the name of The Associated Manufacturers, and he contended that the purchase of the linen was a speculation in the nature of a gambling transaction, and that it did not constitute the carrying on of a trade or business.

The Special Commissioners found that he was carrying on a trade or business within the meaning of s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, and was liable for excess profits duty, and also liable to income tax under Sch. D in respect of the profits or gains arising or accruing from the trade in question. Rowlatt J. affirmed the decisions of the Commissioners, and the appellant appealed.

The appeals were heard on November 24 and 25, 1925.

Harney K.C., *Raymond Needham* and *J. S. Scrimgeour* for the appellant. The transaction in which the appellant was involved was not a trade at all, and if it was, there were no annual profits or gains.

Erichsen v. *Last* (1) shows what constitutes the carrying on of a trade or business, and in order to come within Sch. D the trade or business must be habitually carried on; an isolated transaction, such as this, is not sufficient: *Grainger & Son* v. *Gough* (2); *South Behar Ry. Co.* v. *Inland Revenue Commissioners.* (3) In *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (4) the present point did not arise.

Under Sch. D, Cases I. and II., r. 13, a person carrying on two or more trades may set off the loss on one from the profits of the other, but that would not apply to a case like

(1) (1881) 8 Q. B. D. 414, 416.
(2) [1896] A. C. 325.
(3) [1925] A. C. 476.
(4) [1921] 2 K. B. 403.

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this. The question is what trade had the appellant when he embarked on the purchase of this linen—was he carrying on the trade of purchasing linen? The Commissioners ought to have asked themselves the question whether he had embarked upon the business of a linen dealer, not whether he was carrying on a trade. If there is no trade capable of producing profits by the year, there can be no profits within the Act. The appellant bought this linen with a view to selling it outright, and he was struggling to sell it within the six months allowed him by the contract without any intention of carrying on a regular trade.

Further, to come within Sch. D the profits or gains must be "annual." Annual profit is a different thing from a profit or gain arising in one year. A casual profit for a few months is not an annual profit, that appears clearly from Lord Esher M.R.'s judgment in *Goslings & Sharpe* v. *Blake* (1); *Inland Revenue Commissioners* v. *Hay* (2); per Lord Young in *Assets Co.* v. *Forbes* (3); *Californian Copper Syndicate* v. *Harris.* (4)

In s. 38 of the Finance (No. 2) Act, 1915, which imposed excess profits duty, the profits arising from any trade or business are subjected to charge, thus making the net wider, but the word "annual" is reintroduced into the Income Tax Act, 1918. Excess profits duty covers all profits; income tax only annual profits. That distinguishes this case from *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (5), which is also different on the facts, because there the character of the article was changed; here it was not. The present case is similar to *Hudson's Bay Co.* v. *Stevens.* (6) In order to discover whether there is an annual profit you have to consider the nature of what is done: per Atkin L.J. in *Stubbs* v. *Cooper* (7), and that would entail the consideration of what was in the contemplation of the

(1) (1889) 23 Q. B. D. 324, 327.
(2) (1924) 8 Tax Cas. 636; 61 S. L. R. 375.
(3) (1897) 3 Tax Cas. 542, 548; 34 S. L. R. 486.
(4) (1904) 5 Tax Cas. 159.
(5) [1921] 2 K. B. 403.
(6) (1909) 5 Tax Cas. 424; 25 Times L. R. 709.
(7) (1925) 4 Accountants' Tax Cas. 373.

appellant; the nature of the transaction; and whether it was capable of being carried on annually. The Commissioners never applied their minds to any of those considerations.

We submit that *Ryall* v. *Hoare & Honeywill* (1) was wrongly decided. If that decision is good law it would cover a windfall and a gift, and nullify all the dicta about casual profits as distinguished from annual profits.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the respondent was called upon on the question of "annual" profits only.

When once it is established that a trade is being carried on, then all profits and gains from it are taxable. It may be that where only one profit is made from a transaction, that does not amount to carrying on a trade; but where there are thousands of contracts, as in this case, there can be no doubt that there is a trade or business. The whole basis of the decision in *Hudson's Bay Co.* v. *Stevens* (2) was that the company was not engaging in a trade in land. In *Thew* v. *South-West Africa Co.* (3) it was held that the company was taxable in respect of profits from sales of land because it was a land trading company.

The Act puts no limitation on the word "trade" to show that it must be carried on for a year or more; and although it may be intended to be carried on for less than a year, it is none the less a trade, and the profits taxable.

"Annual" has never been emphasized in the way suggested on behalf of the appellant. The accounting period is the unit, not a year. You cannot separate the connotation of words "annual" and "trade" and say that unless a trade was annual, there was no trade within the meaning of the Act. An annual payment does not cease to be annual because it is payable only once: per Rowlatt J. in *Inland Revenue Commissioners* v. *Blott.* (4)

Harney K.C. in reply.

Cur. adv. vult.

(1) [1923] 2 K. B. 447. 25 Times L. R. 709.
(2) (1909) 5 Tax Cas. 424; (3) (1924) 131 L. T. 248.
(4) [1920] 1 K. B. 114, 133.

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Dec. 15. POLLOCK M.R. This is an appeal from two judgments of Rowlatt J. dated June 15, 1925, by which he confirmed the decision of the Commissioners in two appeals by Mr. L. J. Martin against assessments upon him in respect of income tax under Sch. D, and of excess profits duty under s. 38, sub-s. 1, of the Finance Act (No. 2), 1915.

It is unnecessary to repeat the facts which are set out in the two cases stated. It is sufficient to recall that the appellant on June 17, 1919, agreed to purchase the whole surplus stock of Government aircraft linen remaining in the Government's possession—namely, nearly 45,000,000 yards—and set up a large and skilled organization for disposing of it in smaller quantities. In the result some fifty-five wholesale firms in Belfast purchased nearly 35,000,000 yards of the linen; some 208 export firms bought over 5,000,000 yards, and sales to 1017 retail firms absorbed the remainder of about 5,000,000 yards.

The appellant's wages bill totalled 7000*l.*, and the commission paid on the sales reached to upwards of 20,000*l.*, while the cost of packing the parcels was 17,248*l.* The whole of the linen purchased was disposed of in some seven months.

The office from which these transations were carried on was at 95 High Holborn, which was rented by the appellant from the beginning of July, 1919, till March, 1920.

The appellant's contention was that he had had one speculation in the nature of a gambling transaction, and had not carried on a trade or business, for his own calling was that of a merchant engaged in the business of wholesale machinery under the name of The Associated Manufacturers, a business which had no part in, or affinity to, the trade in linen.

We agree with the Commissioners and Rowlatt J. that this contention is untenable. The appellant entered upon this separate and new trade, or business, or adventure, for the purpose of realizing profits or gains in it, and even if his purchase was made under a single contract, the realization of his profits, which were large, was accomplished by his setting up a trading organization. If it was

maintained only until the 45,000,000 yards was disposed of, it was none the less characterized as a business while it was in being. Whatever view may be taken by the Courts upon such a point, it is a question of fact which it is for the Commissioners to determine. They had abundant material upon which to reach the conclusion that they did. The appeal, therefore, must fail on this point. It is not possible to lay down definite lines to mark out what is a business or a trade, or adventure, and to define the distinctive characteristics of each; nor is it necessary, or wise, to do so. The facts in each case may be very different, but the facts establish the nature of the enterprise embarked upon.

The Commissioners have found that the appellant was carrying on a trade or business within the meaning of the Act which imposed the excess profits duty, and this determination concludes that appeal against the appellant, and it must be dismissed with costs.

Similarly the Commissioners' decision upon the facts brings the appellant within the liability to income tax in respect of his profits or gains arising or accruing from the trade carried on by him. But the appellant takes a new point upon the question of his liability to income tax. The words of Sch. D are: "Tax under this Schedule shall be charged in respect of (*a*) The annual profits or gains arising or accruing," etc., and he contends that the profits or gains that he has made—admitting for this purpose that he has carried on a trade—are not "annual." He urges that the trade was carried on for some seven or eight months and no more, and that the profits or gains, to fulfil the qualification of being "annual," must arise from some enterprise that is capable, if it is continued, of yielding fruit annually, that is periodically, from year to year, even though it may not in fact be carried on for a full year or for more than a year; that regard must be had to the nature of the enterprise, and what was in contemplation, and what was the motive in undertaking it. Tried by this meaning of "annual," the appellant contends that his profits or gains are not caught by the words of the Schedule.

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It is thus necessary to examine the use of the word "annual," and its meaning in the Income Tax and Finance Acts where it is freely used.

Sch. D contains the detailed provisions necessary to work out the application of the Act to the trades, professions, employments and vocations and other activities and receipts which are embraced in its wide ambit. The charge upon the subject is found in s. 1, which is as follows: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the Schedules marked A, B, C, D and E contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." Sect. 2 is as follows: "Every assessment and charge to tax shall be made for a year commencing on the sixth day of April and ending on the following fifth day of April, except where under the provisions of this Act weekly wage-earners are to be assessed and charged quarterly."

The Finance Act each year imposes the tax, and by its terms revives and continues the system under which provision is made for the collection of the tax. The system is maintained by the operation of s. 210 of the Income Tax Act, 1918, which ensures its application to income tax for the succeeding year. It is clear, therefore, that the Acts contemplate and impose a tax for one year only. Since 1842, when the Act was passed which is the forerunner of the consolidated Act of 1918, this has been the system adopted. Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* (1) said of the income tax passed each year: "The Income Tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again: every revival and re-enactment is a new Act." So, too, the assessors are appointed for the financial year: see s. 76, sub-s. 3, and the collector of taxes is appointed "in the month of April in every year": see s. 80.

(1) [1891] A. C. 531, 591.

Special provision is made for assessment in the case of a trade which is set up in the year of assessment: see r. 1 (2.) applicable to Cases I. and II. of Sch. D. There is, however, no definition of "a trade" which limits it to a trade continued, or the continuance of which is intended or contemplated, beyond the year of assessment, or which defines it as one which has the characteristic of bearing fruit in successive years. The word used is "trade" simpliciter, without restriction, limitation, or definition. There is no case decided in the eighty years and more during which the income tax has been collected which suggests the interpretation sought by the appellant.

It was contended that *Goslings & Sharpe* v. *Blake* (1) was a decision to that effect, but when examined it has no relevance to the point in issue. It was determined upon the meaning to be given to the words in s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), which are as follows: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment." It was held, following the ejusdem generis rule, that interest upon a loan by a banker to a customer for a period of less than a year—short loans, as they are termed among business men—is not caught by these words "yearly interest of money," which connote interest for a year and not less than a year. Lord Esher (2) makes it quite clear that the collocation of the words in the section induce the meaning "for a year," or "over the lapse of a year."

There are, however, some cases which suggest the contrary. Thus Grove J. in *Ryhope Coal Co.* v. *Foyer* (3) takes "annually" to mean "for the current year," and Lindley J. agreed with his view. Rowlatt J. in the course of his judgment in *Inland Revenue Commissioners* v. *Blott* (4) said: "I lay no stress upon the word 'annual.' A dividend for the year is annual for this purpose though only paid once," and in *Ryall* v. *Hoare*

(1) 23 Q. B. D. 324.
(2) Ibid. 327.
(3) (1881) 7 Q. B. D. 485, 497.
(4) [1920] 1 K. B. 114, 133.

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& Honeywill (1) he decided that a casual profit arising from an isolated transaction in the course of the year was taxable under the sixth Case of Sch. D. Under that case the profits must be "annual," so that his decision decides the point raised in the present appeal. He gives reasons for the conclusion to which he came, with which I agree.

Lord Birkenhead's sixth proposition, considered by him in *Coman* v. *Governors of Rotunda Hospital, Dublin* (2), seems to involve a similar expression of opinion.

The wide terms of Sch. D itself appear to require that an unrestricted meaning is to be given to the word "trade," which is still further expanded by s. 237 to include "every trade, manufacture, adventure or concern in the nature of trade."

I cannot find any authority to support the contention made by the appellant that the characteristic of repeating the profits or gains in other years beyond the year of assessment and charge must be attached to the trade carried on so as to make the gains annual.

In my judgment Rowlatt J. was right. "Annual" means in the current year, occurring in the year of the assessment to taxation. For these reasons the appellant fails on this point also as to the income tax. The assessment was rightly made, and the appeal must be dismissed with costs.

ATKIN L.J. (read by SARGANT L.J.). These two appeals are in respect of assessments to income tax and excess profits duty respectively. For income tax the appellant has been assessed under the Income Tax Act, 1918, Sch. D, under Case I. and Case VI. The question is whether annual profits or gains have arisen or accrued to him from any trade carried on in the United Kingdom or elsewhere (Case I., r. 1), or otherwise (Case VI.). For excess profits duty the appellant has been assessed under the Finance (No. 2) Act, 1915, and subsequent Acts. The question here is whether profits have arisen to him from any trade or business (whether continuously carried on or not) of any description carried

(1) [1923] 2 K. B. 447. (2) [1921] 1 A. C. 1, 11, 14.

on in the United Kingdom (Finance (No. 2) Act, 1915, s. 38). The excess profits duty appeal only raises the question whether the appellant carried on a trade or business: the income tax appeal raises the same question: but also the further question whether the profits that arose to the appellant were within the terms of the Act "annual profits."

The first question, as to whether the appellant's operations could properly be found to be carrying on a trade, does not appear to me to admit of doubt. Taking into account the ordinary occupation of the appellant, the subject matter of his purchase and sale, the method adopted for disposal, the number of the operations, and the period occupied, there is ample evidence to support the finding of the Commissioners that the appellant carried on a trade. This disposes of the excess profits duty appeal, which must be dismissed with costs.

The other question is one of general importance, upon which there appears to be only one direct decision, *Ryall* v. *Hoare & Honeywill* (1), which is a decision of Rowlatt J. directly opposed to the appellant's contention, and this case is in effect an appeal from that decision. The contention is that annual profits mean profits recurring year by year, or derived from a source capable of, or at any rate intended to be capable of, producing profits year by year, and that there must, therefore, be in contemplation, at the least, profits for more than one year. That the words "annual profits," therefore, do not include profits from an adventure which is begun and completed within one year: just as, so it is suggested, they do not include any profits made in employment for a period not extending over a year by a man whose general occupation is not to be employed, or in journalism, or in the exercise of an art, by a man who is not a journalist or an artist: or from the possession of property where the profits do not recurrently arise from the property, as in the case of a single instance of letting a house furnished for a short period.

The argument for the Crown is that the words "annual

(1) [1923] 2 K. B. 447.

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profits" merely mean profits arising for the year of charge, profits of the year. It is pointed out that all the classes of non-periodic profits which the argument of the appellant seeks to exclude, have, in fact, in ordinary practice for years been included in assessments for income tax: and the judgment of Rowlatt J. in *Ryall* v. *Hoare & Honeywill* (1) is maintained to be right. In my opinion the judgment in the case cited was correct, and the contention of the appellant fails. His contention derives what plausibility it possesses from the terminology of the Income Tax Act, which now is the Act of 1918, and is not free from difficulty. Why, it is asked, does Sch. D (*a*) speak of "annual" profits or gains arising from trade, while in (*b*) it speaks of "all interest of money, annuities, and other annual profits or gains," unless in respect of interest of money it wishes to exclude some quality other than that of being annual interest, which must be other than that of being interest of the year? Why again does it use the phrase in the rule to Case II., "whether such retainer shall be annual or for a longer or shorter period," unless the word there connotes something at least different from "of a year," and probably equivalent to recurrent? Again it is said "annual" and "yearly" must be equivalent terms, and if so what is the meaning of "any interest of money whether yearly or otherwise" in Case III., r. 1 (*a*), unless "yearly" means something more than interest on a transaction completed within six months? And the case of *Goslings & Sharpe* v. *Blake* (2) was cited, where the power given by s. 40 of the Income Tax Act, 1853, to deduct the amount of income tax from the payment of any yearly interest of money, was held not to authorize the deduction from payment of interest on a loan from a banker to a customer for a period of less than a year. Lord Esher M.R., in dealing with this phrase, said (3): "The word 'other' obliges us to say that an annual payment is an instance of the same kind as those that have gone before, so that what have gone before are in the nature of annual payments . . . . 'any rent'

(1) [1923] 2 K. B. 447.
(2) 23 Q. B. D. 324.
(3) Ibid. 327.

becomes 'any annual rent.' 'Any yearly interest of money' surely cannot be interest for less than a year in ordinary English, and there remain 'any annuity,' which is admitted to be an annual thing, and any 'other annual payment.'" The same words are now found in r. 19 (1.) of the General Rules to all Schedules.

If one could adopt as a rigid canon of construction an assumption that in any statute the same word is always used with the same meaning, one's task would perhaps be easier: but it is plain that the assumption is ill-founded: and particularly so in regard to the Income Tax Acts. We must have regard to the context. When the history of the Income Tax Acts is looked at, the meaning of the words in question becomes plain. One may begin with the Income Tax Act of 1842, when income tax, after a period of relief, was re-enforced. The Act itself, unlike the Act of 1918, imposes the tax and fixes the amount, providing by s. 1 that from April 5, 1842, there shall be charged, during the term thereinafter limited, the several rates and duties mentioned in the Schedules. Sch. D was, "Upon the annual profits or gains arising or accruing to any person residing in Great Britain from any trade . . . . there shall be charged yearly for every twenty shillings of the amount of such profits or gains the sum of sevenpence." By s. 193 the Act was to continue in force until April 6, 1845. It was renewed for two further periods of three years and then of one year: and in 1853 was passed the Income Tax Act of that year, which again was an Act directly charging the subject and fixing the amount of the tax. It altered the form of charge. Sect. 1 begins: "From and after April 5th, 1853, there shall be charged," etc., "and paid yearly during the respective terms hereinafter limited, the several rates and duties mentioned—namely, For and in respect of the annual profits or gains arising or accruing to any person resident in the United Kingdom from any . . . . trade for every twenty shillings of the annual value or amount thereof during the term of the next two years sevenpence, the further term of two years sixpence, and the further term

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of three years fivepence." By s. 2: "For the purpose of classifying and distinguishing the several properties, profits, and gains . . . . and for the purpose of assessing . . . . such duties, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains comprised in the several Schedules," and the Schedules with which we were for so long familiar are set out. Sch. D does not materially depart from the terms of the first section as set out above. It is: "For and in respect of the annual profits or gains . . . . to be charged for every twenty shillings of the annual amount of such profits and gains."

In 1854 (17 & 18 Vict. c. 24) the amount of the tax was increased by reason of the war in the Crimea. The charging section, s. 1, is that there shall be charged in lieu of the rates and duties chargeable under the Act of 1853 in respect of all property, profits and gains chargeable under the Act the increased rate and duty of 1*s.* 2*d.* for every twenty shillings of the annual value or amount of all such property, profits and gains. The terms of the Act of 1853 expired on April 5, 1860, and in that year there was imposed for one year commencing on April 6, 1860, for and in respect of all property, profits and gains chargeable under the Act of 1853 the rate or duty of tenpence for every twenty shillings of the annual value or amount of all such property, profits or gains: and by s. 2 it was provided that the duties should be assessed, raised and so on under the regulations and provisions of the Act of 1853 and all the forms, etc., of that Act should apply to the collection of the duties of the present Act. This procedure has continued until 1918. Income tax was imposed by an Act for a year, sometimes called an Income Tax Act, then a Customs and Inland Revenue Act, and later, as at present, a Finance Act. The provisions of the Acts of 1842 and 1853, the operation of which had expired, were incorporated into each yearly Act, at first by express reference, latterly by the formula that all the provisions of any Act relating to income tax as were in force on the last day of the preceding financial year and were not repealed by the

then Act should have full force and effect on the duties thus imposed, so far as consistent with that Act. I find this form in s. 2 of the Customs and Inland Revenue Act of 1873, when the duty was only threepence, and when the long-established statutory exemption of judges' salaries from all taxation was removed by the Judicature Act of that year: and it has continued in similar form to the present day.

The Income Tax Act, 1918, is constructed on different lines from the Acts of 1842 and 1853. It does not impose any duty at any rate. It is in the nature of an Income Tax Clauses Act, and is to apply whenever any Act imposes any income tax. Sect. 1: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D, and E, ... and in accordance with the Rules respectively applicable to those Schedules." Though the Act is called a consolidating Act, in various provisions the wording of the previous Acts is altered, and I should consider that it was plain that where the words used have a plain meaning that alone must be given effect to, though, no doubt, in cases of doubt regard may be had to previous legislation which this Act purported to consolidate. Sch. D does not materially differ from the original Schedules in the Act of 1853. The tax, so far as relevant, is imposed on all annual profits or gains arising or accruing from any trade for every twenty shillings of the annual amount of the profits or gains. It is not irrelevant to recur to the following provisions: Para. 2 of the Schedule: "Tax . . . . shall be charged under the following cases respectively; . . . . Case VI. Tax in respect of any annual profits or gains not falling under any of the foregoing Cases." Rules applicable to Cases I. and II., r. 1 (2.): "Where the trade . . . . has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." Rules applicable to Case VI. (2.): "The computation shall be made, either on the full amount of the profits or gains arising in

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the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners." In this last rule it may be noticed that the consolidating Act has changed the wording of the rule, substituting "profits or gains arising in the year of assessment" for the words in the rule to the sixth Case in the Act of 1853, "profits or gains received annually." It appears to me that these words indicate that the statute meant to charge profits made from trading within the year of assessment for less than a year, though this does not entirely dispose of the plaintiff's contention that the trade must be capable of recurrent profits: and secondly that the statute is capable of using the words "arising in the year of assessment" as the equivalent of "annual."

On this survey of the legislation it appears to me plain that when the original Act of 1842 granted for a term of three years upon the annual profits a charge yearly for every twenty shillings of the amount of such profits, it was intending to impose a charge for the year upon the profits for the year on twenty shillings of the amount for the year, and when the Act of 1853 said that the rate shall be charged yearly on the annual profits or gains for every twenty shillings of the annual amount, it meant the same thing. The same construction should be placed upon the Act of 1918, the language of which is, I think, made plainer by the terms of the rules which I have just set out. I am inclined to accede to the argument that "annual" often, perhaps usually, connotes recurrence, and that it is sometimes used with that connotation in the Income Tax Acts; on the other hand it sometimes means "of the year," and is also used in that connotation in the Income Tax Acts. In the context in which it is used in this Schedule it appears to me to mean profits of the year of charge. In that view the question that arises in respect to them is not whether they are recurrent or capable of being recurrent. With that quality an Act imposing taxation for a year only may be considered to take little concern. The question is whether they can

fairly be brought within the main purview of the Acts, which is to tax income, not capital: and whether, if they are profits in the sense of income, they arose within the year in respect of which the Legislature is exacting revenue. For these reasons I think that this appeal also should be dismissed with costs.

SARGANT L.J. The first question to be answered is one common to both these appeals—namely, was there material before the Commissioners on which they could properly find that there was a carrying on of trade by the appellant within the Income Tax Acts? It has been urged that there was here a single transaction by way of purchase, but this is by no means conclusive. It is not essential to trading or trade as defined by the Acts that there should be a series of transactions both of purchase and of sale. A series of retail purchases followed by one bulk sale, or a single bulk purchase followed by a series of retail sales, may well constitute a trade. Indeed, the contrary view was but faintly, if at all, urged for the appellant. His case rather was that, as he had made a single bulk purchase, and had originally intended to dispose of the whole of his purchase by way of a single bulk sale, he was not thereby entering on a trade but was merely embarking on an isolated transaction entirely different from his ordinary business. He meant, it is said, to make a single gigantic speculation.

But this argument gives the go-by to what the appellant actually did as distinguished from what he originally intended. For, having failed to dispose of his purchase by way of a sale in bulk, he proceeded to set up and use for the purpose of realization an extensive selling organization, the general character of which is shown by paragraphs 8 and 9 of the special case and by the account annexed thereto. In these circumstances, not only were the Special Commissioners entitled to find that the appellant was carrying on a trade, but I cannot for myself see how they could have come to any other conclusion.

This disposes altogether of the second appeal. But as

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regards the first appeal, a second argument has been presented for the appellant—namely, that, even if he was carrying on a trade, the profits realized thereby were not "annual" within the meaning of the Income Tax Acts. It was argued that the use in the Acts of the phrase "annual profits" implies that the trade from which they are derived has, or at any rate was intended to have, some element of permanence resulting in the production of recurrent annual profits; and in this connection the decision in *Goslings & Sharpe* v. *Blake* (1) was referred to. But in my judgment that decision merely dealt with the meaning of the word "annual" in a different part of the Act, and in a very special collocation—namely, "any rent, or any yearly interest of money, or any annuity or other annual payment," and has no applicability here. And I can find nothing in the legislation in question (which has reference to a series of Acts each imposing a rate of tax for a single year) to suggest that "annual" means anything but "during the year in question"; or that the trades or adventures being dealt with are limited to enterprises lasting, or intended to last, more than a year, and so calculated to yield recurrent annual profits. I agree with the recent decision to that effect of Rowlatt J. in *Ryall* v. *Hoare & Honeywill.* (2)

Further, even if the phrase "annual profits" indicated that the trade was intended to last, or to be capable of lasting, for more than a year, I doubt whether this would be sufficient for the appellant. His operations were, in fact, concluded within the period of some seven months. But the process of realization might well have lasted over a year or more. And it is reasonably clear that the appellant intended that his operations should continue until the whole of his purchase was realized.

I agree that both appeals should be dismissed.

Appeals dismissed.

Solicitor for the appellant: *Charles Wright.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

(1) 23 Q. B. D. 324. (2) [1923] 2 K. B. 447.

R. M.

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Jan. 21, 22;
March 18.

Poor Law—Relief given to Pauper—Right of Guardians to recover Amount from Pauper—Poor Law Amendment Act, 1834 (4 & 5 *Will.* 4, *c.* 76), *s.* 58.

Poor law guardians who have given ordinary poor relief to a person have a common law right to recover in respect of the same from him. His ability to pay is not relevant to the guardians' cause of action. So *held* following *In re Clabbon* [1904] 2 Ch. 465; *Birkenhead Union Guardians* v. *Brookes* (1906) 95 L. T. 359; and *St. Mary Islington Guardians* v. *Biggenden* [1910] 1 K. B. 105.

Appeal from Pontypridd County Court.

The plaintiffs claimed to recover 6*l.* 12*s.* 6*d.* from the defendant as the cost of goods supplied to him during several weeks in 1921 by way of ordinary poor relief, or, alternatively, as poor relief by way of loan under the Poor Law Amendment Act, 1834.

The county court judge found that the first weekly supply to the defendant was intended by the plaintiffs as ordinary relief, and that the subsequent supplies were intended by them to be by way of loan, but that no intimation of this was made to the defendant, who received all the goods in the belief that he was obtaining ordinary poor relief; and he decided that the plaintiffs were not entitled to recover from the defendant either by statute or at common law.

The plaintiffs appealed.

Montgomery K.C. and *Stanley Evans* for the plaintiffs. The decision of the county court judge disregards a series of binding authorities, and is also contrary to the provisions of the Poor Law Amendment Act, 1834, which enables poor relief to be given by way of loan. Apart from that statutory provision, however, the authorities are quite clear that guardians have a common law right to recover from a person who has received poor relief from them. In *In re Clabbon* (1), Farwell J., who followed *West Ham Union Guardians* v. *Pearson* (2), said: "I cannot agree that a pauper, who takes

(1) [1904] 2 Ch. 465, 467. (2) (1890) 62 L. T. 638.

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relief in the shape of necessaries which keep him alive, takes that relief so entirely of right that he is not under a legal liability to pay if he afterwards comes into money." That dictum was applied by the Divisional Court in *Birkenhead Union Guardians* v. *Brookes* (1) and by Bray J. in *St. Mary Islington Guardians* v. *Biggenden.* (2) The still later case of *Wandsworth Union Guardians* v. *Pharoah* (3) decided that the right of the guardians to obtain judgment in such cases is not conditional on proof of means.

[They also referred to *Attorney-General* v. *Merthyr Tydfil Union.* (4)]

Vaughan Williams K.C. and *Gwyn Rees* for the defendant. The county court judge came to a right conclusion. The debt alleged to be due to the guardians can arise only by contract or by obligation of law. There was no contract in fact. Is there then any obligation by the defendant to repay the poor relief granted to him? No doubt whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on his part to pay for them out of his own property: see *In re Rhodes* (5) and *In re J.* (6) But that principle has no application where, as here, there was capacity to contract. Guardians are not traders—if they were the position would be different—but merely carry out the duties placed upon them by the poor law statutes. The Poor Relief Act, 1601, is silent as to the right to claim repayment from a person who has received poor relief. Some of the later statutes create, in certain specified circumstances, an obligation to repay. For example, s. 29 (now repealed) of the Poor Relief Act, 1819, enabled overseers to give relief by way of loan only; s. 58 of the Poor Law Amendment Act, 1834, and s. 8 of the Poor Law Amendment Act, 1848, give a similar power: see also Poor Law Amendment Act, 1849, s. 16; Divided Parishes Act, 1876, s. 23; Married Women's Property Act,

(1) (1906) 95 L. T. 359.
(2) [1910] 1 K. B. 105.
(3) (1924) Poor Law Officers' Journal, May 9, 1924, p. 578.
(4) [1900] 1 Ch. 516.
(5) (1890) 44 Ch. D. 94.
(6) [1909] 1 Ch. 574.

1870, s. 13; Married Women's Property Act, 1882, s. 20; and Married Women's Property Act, 1908, s. 1. All that legislation was quite unnecessary if guardians have a common law right to recover in respect of poor relief granted. It is said, however, that the question is concluded by the decision of the Divisional Court in *Birkenhead Union Guardians* v. *Brookes*. (1) We ask this Court to reconsider that case on the ground that the course of poor law legislation was not brought to the attention of the judges who decided it. Moreover, the observation in that case of Darling J. that the obligation on the pauper to repay "does not depend upon any implied contract at all, but it does depend upon what the State itself, in giving him the benefit, has decided to be a proper and natural return which he shall make for the benefit conferred upon him," finds no warrant in any of the authorities.

Montgomery K.C. in reply. It is too late, in view of the authorities, to advance the argument as to the course of poor law legislation.

Cur. adv. vult.

March 18. SALTER J. read the following judgment: In this case the guardians of the Pontypridd Union sued Samuel Drew for 6*l.* 12*s.* 6*d.*, the cost of goods supplied to him by way of ordinary poor relief, or, in the alternative, poor relief granted by way of loan under the Poor Law Amendment Act, 1834. The county court judge gave judgment for the defendant, disregarding the authorities to which I will refer. The guardians appeal.

The relief was given weekly between April 15 and June 30, 1921. The guardians thought fit to grant it as outdoor relief in the form of orders on tradesmen for goods. No doubt the amount of relief was fixed in view of the fact that Drew had a wife and family, but the county court judge found that the whole of the relief was in fact granted to Drew. He found on the facts that the first weekly supply was intended by the guardians as ordinary relief, and that

(1) 95 L. T. 359.

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the subsequent supplies were intended by them to be granted by way of loan, but that no intimation of that intention was made to Drew, who received all the goods in the belief that he was receiving ordinary poor relief. On these facts I agree with the learned judge that the plaintiffs were not entitled to recover on the footing of a loan in fact, nor was any claim made on that footing. The alternative claim was that they were entitled to treat the grant as a grant by way of loan by virtue of the Poor Law Amendment Act, 1834. Sect. 58 of that Act provides that any relief which the Commissioners (now the Ministry of Health) shall by any Order declare or direct to be given or considered as given by way of loan shall be considered and the same is thereby declared to be a loan. The Relief Regulation Order, 1911, provides that any relief which may lawfully be given thereunder may, if the guardians think fit, be given by way of loan; but the Order does not direct any relief to be given by way of loan, nor does it direct or declare that any relief which has been, or may be, given shall be considered as given by way of loan. The alternative claim, therefore, fails. The plaintiffs have no statutory right to recover in this action.

As regards the claim at common law, the plaintiffs' proposition is that when guardians supply goods to a pauper by way of ordinary poor relief, they have a common law right to be paid by the pauper the reasonable value of the goods so supplied. Some of the cases seem to me to suggest that the pauper's liability is to pay if he is able, and when he is able. Whether the right is conditional on proof of means, and limited to the means proved, are minor matters. The broad question is whether guardians have a common law right to be paid for ordinary poor relief.

The poor law statutes seem to me to show that Parliament has legislated since the poor law began on the assumption that no such right exists. The Poor Law Relief Act, 1819, s. 29, provided that where an applicant for poor law relief was shown to be unthrifty, the overseers might grant relief by way of a loan of money on a written promise to repay;

that application might be made to justices within a year of the loan; and that justices might order payment to such an extent and in such manner as they thought fit, with leave to commit in default for not more than three months. The overseers thus acquire, more than two hundred years after the institution of the poor law, a limited right to grant poor relief on loan and a limited right to enforce payment. I have difficulty in understanding the object of this legislation if the overseers already had, and had possessed for two centuries, a common law right to be paid in full for ordinary poor relief, a right enforceable by action and imprisonment for an indefinite time. The Poor Law Amendment Act, 1834, provides in s. 58 (the section which is relied on in this action) that any relief which the Commissioners shall direct or declare to be by way of loan shall be deemed to have been so given. Sect. 59 gives power, in all cases of actual or assumed loan, to attach wages in the hands of an employer. Sect. 59 gives a new remedy and is not inconsistent with a common law right to payment for ordinary relief. But s. 59 may not apply, as for instance where the ex-pauper is working for himself. Sect. 58 must be read alone. It enables the national authority to invest the guardians with the common law rights of a lender in respect of ordinary poor relief, that is to say, to give them a common law right to payment for such relief. I do not understand the object of this legislation, if the guardians already had this right and had had it for 233 years. The Poor Law Amendment Act, 1849, s. 16, deals with cases where a pauper has acquired property, and gives the guardians a right to seize or to sue. The right is limited to one year's maintenance. The right to sue is a right to "recover the same as a debt before any local Court." This is the first and only statutory power to sue for payment for poor relief not granted, or deemed to be granted, by way of loan. The section seems to me to show that, in the contemplation of the Legislature, there was no pre-existing right to payment for ordinary poor relief, and no debt until a debt was created by the statute. Many actions were

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brought on this section, for example, *West Ham Union Guardians* v. *Ovens*. (1) The guardians had given relief to the defendant, his wife and family, for five years at a cost of about 100*l*. He became entitled to, and received, a sum of nearly 300*l*. The guardians sued him under this section for 19*l*. 19*s*., the cost of one year's maintenance. Why did the guardians, in this and many other cases, enforce a statutory right to one year's maintenance if they had a common law right to payment in full? In the Reform Act, 1832, s. 36, and again in the Representation of the People Act, 1918, s. 9, sub-s. 1, the Legislature, in dealing with disqualification for the franchise, uses the expression "poor relief or other alms." The poor law statutes show an increasing tendency to enlarge the statutory rights of guardians to recover payment for poor relief, and these rights are now extensive, but they seem to me to show that Parliament has always regarded ordinary poor relief as a gift, subject only to the right of the guardians to obtain payment to the extent and in the manner provided by the statutes.

The decided cases do not, however, support this view. In *In re Buckley's Trust* (2); *In re Newbegin's Estate* (3); and *In re Watson* (4) the possibility that guardians might have the common law right now claimed had been mentioned and not dismissed, but certainly not decided. *West Ham Union Guardians* v. *Pearson* (5) is relied on in the later cases. There the defendant was suffering from delirium tremens, and was a danger to himself and others. The guardians, acting under the Lunatic Asylums Act, 1853, took care of him until he recovered, and then sued him for the expense. He was not a pauper, and there was no question of poor law or poor relief. This Court held that the guardians were entitled at common law to payment, as having supplied necessaries to a lunatic.

The first case in which it was held that guardians have a

(1) (1872) L. R. 8 Ex. 37.
(2) (1860) Johns. 700.
(3) (1887) 36 Ch. D. 477.
(4) [1899] 1 Ch. 72.
(5) 62 L. T. 638.

common law right to be paid for poor relief is *In re Clabbon.* (1) If this right exists it has existed since 1601. It is first laid down three hundred years after the establishment of the poor law. An infant had been maintained by the guardians for more than six years, and had become entitled to a sum of money more than sufficient to pay for such maintenance. On an originating summons by the guardians the question was whether they could claim for six years or only for twelve months, that is to say, whether their right to payment was a common law or a statutory right. Farwell J. said (2): "I cannot agree that a pauper, who takes relief in the shape of necessaries which keep him alive, takes that relief so entirely of right that he is not under a legal liability to pay if he afterwards comes into money." *In re Clabbon* (1) purports to follow *West Ham Union Guardians* v. *Pearson.* (3) That case is no doubt in point in so far as it shows that guardians who supply necessaries, in the discharge of their duty, to a person incapable of contracting, have the same right to payment as a tradesman who voluntarily supplies his own goods to such a person. But because the guardians can recover when they supply necessaries to a solvent person, it does not seem to me to follow that they can make a pauper pay for poor relief. *In re Clabbon* (1) was followed in this Court in *Birkenhead Union Guardians* v. *Brookes.* (4) The plaintiffs sued the defendant, a sane adult pauper, for the cost of maintaining him in the workhouse. He had come into a sum of money, which was evidently sufficient to pay the claim. The guardians relied on *In re Clabbon.* (1) Counsel for the defendant, instead of challenging that decision, which was not binding on the Court, admitted its correctness, and argued that the guardians had larger common law rights to payment against an infant, than against an adult, pauper —an impossible contention, as it seems to me. The Court held that a pauper is liable at common law to pay for goods supplied to him as ordinary poor relief "when he comes into

(1) [1904] 2 Ch. 465.
(2) Ibid. 467.
(3) 62 L. T. 638.
(4) 95 L. T. 359.

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we are bound, and that the county court judge should have been bound, by the authorities to which I have referred. The appeal must be allowed, and judgment entered for the guardians for the amount of their claim.

ACTON J. concurred.

Appeal allowed. Leave to appeal granted.

Solicitors for plaintiffs: *Wrentmore & Son, for Spickett & Sons, Pontypridd.*

Solicitors for defendant: *Warren & Warren, for Edward Roberts, Dowlais.*

J. S. H.

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Local Government—Public Health—Defective Water Supply—Nuisance—Tenement House—Owner—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 48, 141—*London County Council (General Powers) Act*, 1907 (7 *Edw.* 7, *c. clxxv.*), *ss.* 3, 78.

The respondent was lessee of a house in the county of London, which he let to one Allund at a rental of 15*s.* a week, subsequently raised to 1*l.* 0*s.* 9¾*d.* a week. Allund occupied the basement himself and sublet the three upper floors, each to a different tenant. The total rent paid by the three tenants to Allund was 1*l.* 2*s.* a week. There was no water supply on two of the upper floors, and the sanitary authority by virtue of the Public Health (London) Act, 1891, ss. 4 and 48, amended by the London County Council (General Powers) Act, 1907, s. 78, served notice on the respondent as "owner of the premises" to abate the nuisance and provide a proper water supply upon these floors. The respondent failed to comply with the notice, and upon a complaint against him the justices refused to convict on the ground that he was not "owner" as defined by the Public Health (London) Act, 1891, s. 141:—

Held, that the justices had wrongly decided, and that the case must be remitted to them with a direction to make the order asked.

"Owner" for the purposes of the above statutory provisions means the person who for the time being receives the rack rent of the whole of the premises.

A mesne tenant who receives subsidiary rents from parts of the premises less than the whole is not "owner of the premises," even

though the rents which he receives make up two-thirds of the full annual value of the premises and so exceed that which would constitute a rack rent of the whole premises.

Rice v. *White* [1904] 2 I. R. 8 not followed.

CASE stated by justices for the borough of Kensington.

In March, 1925, a complaint was heard before three justices that the respondent had failed to comply with notices served on him by the appellants under the Public Health (London) Act, 1891, ss. 4 and 48 (1), requiring him to provide a proper and sufficient supply of water to the upper floors of premises known as 45 Testerton Street, W. The justices after hearing the evidence dismissed the complaint, but they stated a special case for the opinion of the High Court.

The following statement of the facts and arguments is taken from the case stated :—

(1.) The respondent at all material times was the assignee of the term of a lease of the messuage known as No. 45 Testerton Street, W., which consists of a basement, ground floor, first floor and second floor. The said lease, which was for a term of 98 years from March 24, 1866, was assigned to the respondent by an assignment dated June 16, 1919, and the rent reserved by the said lease was 7*l.* 10*s.* per annum. At the date of the said assignment the whole of the said messuage was in the possession and occupation of one Allund as tenant of the assignor. The said Allund remained in possession and occupation of the whole of the said messuage

(1) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, sub-s. 1, requires the sanitary authority, under certain circumstances, if satisfied of the existence of a nuisance to serve notice on the occupier or owner of the premises on which the nuisance arises; and (sub-s. 3) where the nuisance arises from any want or defect of a structural character the notice is to be served on the owner.

Sect. 48, sub-s. 1: "An occupied house without a proper and sufficient supply of water shall be a nuisance liable to be dealt with summarily under this Act, and if it is a dwelling-house shall be deemed unfit for human habitation."

Sect. 141: "The expression 'owner' means the person for the time being receiving the rack rent of the premises in connexion with which the word is used . . . . or who would so receive the same if such premises were let at a rack rent.

"The expression 'rack rent' means rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises. . . . ."

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we are bound, and that the county court judge should have been bound, by the authorities to which I have referred. The appeal must be allowed, and judgment entered for the guardians for the amount of their claim.

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The following statement of the facts and arguments is taken from the case stated :—

(1.) The respondent at all material times was the assignee of the term of a lease of the messuage known as No. 45 Testerton Street, W., which consists of a basement, ground floor, first floor and second floor. The said lease, which was for a term of 98 years from March 24, 1866, was assigned to the respondent by an assignment dated June 16, 1919, and the rent reserved by the said lease was 7*l.* 10*s.* per annum. At the date of the said assignment the whole of the said messuage was in the possession and occupation of one Allund as tenant of the assignor. The said Allund remained in possession and occupation of the whole of the said messuage

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after the said assignment as tenant of the respondent on a weekly tenancy at a rent of 15*s.* per week, which was subsequently increased to 1*l.* 0*s.* 9¾*d.* per week. There was no restriction in the said demise to the said Allund against subletting, and the said Allund at a date subsequent to the said assignment sublet portions of the said demised premises on weekly tenancies as follows, that is to say, the second floor to one sub-tenant, the first floor to a second sub-tenant, and the ground floor to a third sub-tenant. Thereupon the said messuage became and has since remained a "tenement house" as defined in s. 3, sub-s. 2, of the London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.). (1) The total rents payable by the said sub-tenants to the said Allund amounted to the sum of 1*l.* 2*s.* per week. The said Allund continued and still continues to occupy the basement of the said messuage, which consists of two rooms. Either of the said weekly rents of 1*l.* 0*s.* 9¾*d.* or 1*l.* 2*s.* exceeds two-thirds of the full annual value of the said messuage. The rental value of the basement of the said messuage is 7*s.* per week.

(2.) There was no provision for a supply of water for domestic or any purposes on the first or the second floor of the said messuage, but the supply of water in the basement and on the ground floor thereof was such as would be a proper and sufficient supply if the said messuage were occupied as a whole by one tenant.

(3.) By reason of the provisions of the London County

(1) The London County Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), provides :—

Sect. 3, sub-s. 2 : "In and for the purposes of the several Parts of this Act hereinafter specified the following words and expressions have respectively the meanings hereby assigned to them (that is to say)—

"In Part XII. . . . . 'Tenement House' means any house occupied by any person of the working class which is wholly or partially let in lodgings or which is occupied by members of more than one family."

Sect. 78 : "For the purposes of s. 48 (Provisions as to house without proper water supply) of the Public Health (London) Act, 1891, a tenement house shall be deemed to be a house without a proper and sufficient supply of water unless there shall be provided on the storey or one of the storeys in which the rooms or lodgings in the separate occupation of each family occupying such house are situate a sufficient provision for the supply of water for domestic purposes. . . . ."

Council (General Powers) Act, 1907 (7 Edw. 7, c. clxxv.), s. 78, the said messuage as a whole was an occupied house without a proper and sufficient supply of water, and constituted a nuisance within the Public Health (London) Act, 1891, s. 48, sub-s. 1, which said nuisance arose from a want or defect of a structural character.

(4.) The appellants, who are the sanitary authority of the borough of Kensington under the Public Health (London) Act, 1891, duly served two notices purporting to be in conformity with the provisions of s. 4 of the aforesaid Act on the respondent in respect of (inter alia) the aforesaid absence of a water supply to the upper floors of the said messuage. The respondent did not comply with any of the requisitions of the aforesaid notices relating to the matters referred to in the said complaint, including the discharge over a gulley within the time therein specified or at all. The performance of the said requisitions were necessary to abate the aforesaid nuisance and to prevent the recurrence of such nuisance, and to satisfy the requirements of the London County Council (General Powers) Act, 1907, s. 78.

(6.) On the part of the appellants it was contended that the respondent was the owner within the meaning of the Public Health (London) Act, 1891, s. 4, of the premises in respect of which the said notices were served; that by reason of the aforesaid facts proved and admitted before us the respondent had committed the offence set out in the complaint.

(7.) On the part of the respondent it was contended that, notwithstanding the fact that the said nuisance existed, the respondent had not committed the offence set out in the complaint on the ground that the respondent was not the owner within the meaning of the Public Health (London) Act, 1891, s. 4, of the premises in respect of which the said notices were served so far as they related to the matters referred to in the said complaint.

(8.) Our attention was directed to the following decisions: *Field & Sons* v. *Southwark Borough Council* (1): *Rice* v. *White*. (2)

(1) (1907) 96 L. T. 646; 71 J. P. 240.

(2) [1904] 2 I. R. 8.

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Montgomery K.C. and *C. L. Henderson* for the appellants. By the interpretation clause (s. 141) of the Public Health (London) Act, 1891, the "'owner' is the person for the time being receiving the rack rent of the premises in connexion with which the word is used": and "'rack rent' means rent which is not less than two-thirds of the full annual value of the premises out of which rent arises." The respondent fulfils exactly those conditions. In *Field* v. *Southwark Borough Council* (1), where the facts were similar to those in the present case, the Court held that no order could be made upon the "owner" to provide a supply of water sufficient for the needs of the top floor as separately occupied. To remedy the effect of this decision in the case of "tenement" houses the London County Council (General Powers) Act, 1907, s. 78, was passed, which makes the whole house the unit for consideration. The case of *Rice* v. *White* (2) is a decision contrary to the contention of the appellants here. But that case was before the passing of the Act of 1907, and the definition of "owner" in the Irish Act differs from that in the English Act of 1891, particularly as to the method of ascertaining the annual value. Apart from this we submit that *Rice* v. *White* (2) was wrongly decided.

Macmorran K.C. and *Sydney Turner* for the respondent. Both the respondent and Allund answer the description of "owner" in s. 141 of the Act of 1891. The owner as there defined may be not only the person for the time being receiving the rack rent, but the person "who would so receive the same if such premises were so let at a rack rent." If the mesne landlord receives a rent which is not less than two-thirds of the full annual value, he is owner in receipt of the rack rent for the purposes of the section. It makes no difference that in paying the rent to the head landlord he retains part: *Walford* v. *Hackney Board of Works.* (3)

[LORD HEWART C.J. If a single room were sublet by a tenant, would the tenant be in the position of owner, if the rent which he received were "rack rent" as defined by s. 141 ?]

(1) (1907) 96 L. T. 646; 71 J. P. 240. (2) [1904] 2 I. R. 8.
(3) 43 W. R. 110; 11 Times L. R. 17.

No. It is a question of degree in each case. *Rice* v. *White* (1) was rightly decided, and its ratio decidendi is not affected by the London County Council (General Powers) Act, 1907, s. 78. By that Act in the case of a tenement house summary proceedings are made available for the first time against the owner of the whole house.

[He referred also to *Truman, Hanbury, Buxton & Co.* v. *Kerslake* (2) and *Cook* v. *Montagu.* (3)]

LORD HEWART C.J. [after stating the facts of the case, continued:] The definition of the expression "owner" is to be found in s. 141 of the Public Health (London) Act, 1891. "The expression 'owner' means the person for the time being receiving the rack rent of the premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack rent." The section goes on to define the expression rack rent as "Rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises"; and the full annual value is taken to be "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises, if the tenant undertook to pay all usual tenant's rates and taxes."

In *Field* v. *Southwark Borough Council* (4), which was decided after the passing of the Public Health (London) Act, 1891, the appellants were possessed for a term of years of a house and premises in Blackfriars Road. They let them to a certain person with a covenant upon his part not to sublet without their consent. Nevertheless, without their consent he sublet, and sublet each floor to a separate tenant. In that case also it was found as a fact that the water supply of the house was sufficient if the house had been in the occupation of one tenant only. But the only water supply which was available for the tenant of the top floor was a supply provided in the yard. In those circumstances it was held

(1) [1904] 2 I. R. 8.
(2) [1894] 2 Q. B. 774.
(3) (1871) L. R. 7 Q. B. 418.
(4) 71 J. P. 240; 96 L. T. 646.

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by this Court that no order could be made against the appellants as owners to abate the nuisance, because the top floor could not be treated as an occupied house. It was said that the term "occupied house" meant the structure as let, and the Court added that, even if that initial difficulty had been surmounted, nevertheless the appellants were not owners within the Act inasmuch as they were not in receipt of the rack rent. That case was decided in March, 1907, and the London County Council in August, 1907, were successful in securing the passing of a local Act called the London County Council (General Powers) Act, 1907, which by s. 78 provided as follows: "For the purposes of s. 48, provisions as to house without proper water supply, of the Public Health (London) Act, 1891, a tenement house shall be deemed to be a house without a proper and sufficient supply of water, unless there shall be provided on the storey or one of the storeys, in which the premises or lodgings in the separate occupation of each family occupying such house, are situated, a sufficient provision for the supply of water for domestic purposes." In other words that section provided that if there were a deficiency of that kind in any part of a house of that kind, not merely the part but the whole house was to be deemed a house without a proper and sufficient supply of water. The effect of that enactment was to surmount the first part of the decision in *Field* v. *Southwark Borough Council* (1): it could no longer be said that what was complained of was limited to and affected only the particular storey which was said to be suffering from a deficiency. Henceforward for that purpose the part became the same as the whole, and the house as a house was affected by the deficiency to be found in a part of the house.

By s. 48, sub-s. 1, of the Public Health (London) Act, 1891: "An occupied house without a proper and sufficient supply of water shall be a nuisance liable to be dealt with summarily under this Act, and, if it is a dwelling-house, shall be deemed unfit for human habitation." By s. 4 of the same statute: "On the receipt of any information respecting the existence

(1) 71 J. P. 240.

of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice"; and by sub-s. 3 of that section: "Where the nuisance arises from any want or defect of a structural character"—such as this apparently is—"the notice shall be served on the owner."

Since the passing of the London County Council (General Powers) Act, 1907, it is no longer possible to contend that the house as a house is not affected by this defect: and it is clear that the house itself as a whole became a nuisance. The question remains, who was the owner within the meaning of s. 141? Of whom was it true to say that he was the person for the time being receiving the rack rent of "the premises" in connexion with which the word "owner" was used? Now the premises in connexion with which the word was used means the premises upon which the nuisance was, and this being the particular nuisance the whole house became a nuisance. The question, therefore, was, who was at the material time receiving the rack rent of the whole house No. 45 Testerton Street? Mr. Macmorran, in the course of his argument for the respondent, has directed attention to the subsequent words in that definition "or who would so receive the same if such premises were let at a rack rent." His argument would seem to amount to this: that where there is a letting to a weekly tenant of the premises as a whole, if he lets or might let parts of the premises or the whole of the premises to a sub-tenant or sub-tenants, he becomes the person who would receive the rack rent, if the premises were let at a rack rent, notwithstanding that at a particular time he had sublet not quite the whole but almost the whole. It is an ingenious argument, and it would have the effect of putting every tenant who was free to sublet in the position of the owner. There is, I think, one serious objection to it. It seems to be plain that this alternative

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" or who would so receive the same if such premises were let at a rack rent " is an alternative only in the case where in fact such premises are not let at a rack rent. If the premises are let at a rack rent it is otiose to look further to see if there is somebody else who, in certain circumstances, might let the premises at a rack rent.

No difficulty, I think, arises in this case from the alternative part of that definition. But a formidable argument has been made upon the basis of an Irish case, *Rice* v. *White*. (1) It is true to say, as Mr. Macmorran has contended, that although this Irish case was decided in the year 1904 the reasoning in it is not affected by the London County Council (General Powers) Act, 1907, because in that case ex hypothesi the tenant, Mrs. Fogarty, had sublet a large part of the premises and herself remained in possession of part, and it was not for a moment contended that the house as a whole was not affected by the nuisance. What was required in that case was the construction of proper house drains and water-closets and the removal of an ashpit. It is contended for the respondents with some force that whatever may be the value to be given to the decision in that case it is not diminished by the circumstance, for the purposes of the present case, that the London County Council in the year 1907 obtained a special Act for their own purposes.

In this Irish case Mrs. Fogarty held certain premises in Dublin under a lease from a lady at the yearly rent of 34*l*. The poor law valuation was 38*l*. Mrs. Fogarty had sublet portions of the premises to weekly tenants, and from those lettings she received no less than 107*l*. a year: in other words a sum far exceeding the annual value of the premises considered within the meaning of the statute. Mrs. Fogarty was herself in occupation of the residue of the premises, and it was admitted that the letting value of the part of which she was in occupation was 19*l*. 10*s*. a year. In those circumstances it was held by the King's Bench Division in Ireland that Mrs. Fogarty was the owner of the premises within the meaning of the Public Health (Ireland) Act, 1878, and under

(1) [1904] 2 I. R. 8.

that Act was liable to execute structural sanitary repairs. No help can be derived by the present appellants from any attempt to distinguish in this respect the provisions of the Public Health (Ireland) Act, 1878, from the Public Health (London) Act, 1891. The two statutes are for all material purposes identical, and therefore the question for this Court is whether it is prepared to come to the same decision as that which was come to by the King's Bench Division in Ireland in *Rice* v. *White*. (1) What was involved in that decision? It was that if a person derives from various parts of the premises, making together less than the whole, sums of money as rent, which being taken together amount to a sum equal at least to the amount of the rack rent, then it is true to say of that person that he is receiving the rack rent of the premises. The learned Chief Baron said this: "I think a contrast is drawn by the definition between on the one hand the amount of two-thirds of the valuation and on the other the aggregate amount receivable, or which, if all the premises were let at a rack rent would have been receivable, subject to this one qualification, that the value of the unlet portions must be ascertained by the valuation. The whole of the premises comprises each part of them, and what is received out of the whole is for the purposes of this definition received out of the premises. In other words 'premises' in it is to be read distributively. It follows that the occupation by the mesne landlord of part of the premises does not prevent her from being owner, provided the rent she receives out of the residue of the premises is not less than two-thirds of the valuation."

With the greatest respect to that learned judge and his colleagues who concurred with him, I differ from that conclusion. A distinction must be drawn between two propositions. It is true in a sense that if rent issues out of a part of the premises, it issues out of "the premises." It is another thing to say that because rent is received out of the premises, although only for some parts of them, it is the rack rent of "the premises." The words in the definition clause (s. 141) are: "the expression 'owner' means the person for the time

(1) [1904] 2 I. R. 8, 13.

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being receiving the rack rent of the premises." Here there was a rack rent of the premises, which was a rent paid for the house, but the only person who paid it was Allund and the only person who received it was Allen, the respondent. It matters not that the sums which Allund in his turn received from the subletting of various portions, not the whole of the premises, amounted as a mere matter of arithmetic to a sum exceeding that which would have been a rack rent of the whole premises. In my opinion this section requires that in looking for the owner you should look for the person who for the time being receives the rack rent of the whole premises; and I think that on the facts of this case there was only one person who could fulfil that condition. That person was not Allund, but the respondent. Allund did not receive the rent of the premises, that is to say of this house: he received various subsidiary rents of various parts of these premises. The part no longer matters for any purpose in a case of nuisance arising under this Act.

In my opinion therefore the contention urged and repeated before us on behalf of these appellants was right—namely, that the respondent was the owner within the meaning of s. 4 of the Public Health (London) Act, 1891, of the premises in respect of which the notice was served: that is to say the whole house, No. 45 Testerton Street. I think therefore that these justices did not come to a correct decision in point of law, and that the case ought to be remitted to them with the direction that upon these facts the only conclusion in law is that the respondent was at all material times the owner of the premises referred to.

SALTER J. I agree. I find myself with some anxiety disagreeing with the decision in *Rice* v. *White* (1), to which Palles C.B. was a party. But it appears to me that Mrs. Fogarty, who was the mesne landlord in that case, although she was in receipt of certain rack rents, was not in receipt of the rack rent issuing out of the whole house—in that case No. 24 Phœnix Street: and in that case, as in the present case, it was the whole house that constituted the nuisance.

(1) [1904] 2 I. R. 8.

BRANSON J. I agree. In my view the decision of this case turns upon the true construction to be put upon the word "owner." That involves a consideration of the definition of that word in s. 141 of the Public Health (London) Act, 1891. It seems to me that in order to satisfy that definition the person who is to be the owner must be a person who receives the rack rent of the premises—that is to say, the rack rent of the whole of the premises. I do not mean that if a sub-tenant let off the whole of the premises to separate tenants of his own and the rents he so received were in the sum the rents of the whole of the premises, that would not amount to a receipt by him of the rack rent of the whole of the premises. My judgment is founded upon the fact that the mesne tenant in this case did not receive the rent of the whole of the premises, he having been in occupation of a part of them himself. The result is that I must look for some one who is receiving a rack rent of the whole of the premises, and the only person who satisfies that condition in this case is the respondent Allen.

[LORD HEWART C.J. I should like to add this for the sake of clearness. In contemplating a tenant who was subletting or had sublet, I certainly was not speaking of a tenant who had sublet the whole. I was speaking of a sub-tenant who, although he had a power to sublet the whole, had in fact sublet something less than the whole.]

Appeal allowed.

Solicitors for appellants: *Pontifex, Pitt & Co.*
Solicitors for respondent: *Clifford Webster, Emmet & Coote.*

F. P. F.

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March 4.

REED (INSPECTOR OF TAXES) *v.* SEYMOUR.

Revenue—Income Tax—Profit from Employment—Proceeds of professional Cricketer's Benefit Match—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.

A professional cricketer in the service of the Kent County Cricket Club might, by the rules of the club, be granted a benefit, but this was on the express understanding that he allowed the proceeds to be invested in the name of trustees of the club during the pleasure of the committee. The invested sum was always, however, eventually handed over to him when his career as a cricketer was over, or when he found an investment of which the trustees approved.

The respondent, a professional cricketer in the employment of the club, was granted a benefit, the proceeds from which together with subscriptions, after being held by the trustees on certain securities, were eventually handed to the respondent and applied by him in the purchase of a farm. The respondent having been assessed under Sch. E, r. 1, of the Income Tax Act, 1918, on so much of the fund as represented the gate money at the match :—

Held, that the respondent was not assessable in respect of this sum, inasmuch as it was a mere present and not a profit arising from his employment within Sch. E, r. 1.

Observations of Lord Loreburn L.C. in *Blakiston* v. *Cooper* [1909] A. C. 104, 107 applied.

CASE stated by General Commissioners of Income Tax.

At a meeting of the Commissioners held on October 23, 1924, James Seymour, professional cricketer (hereinafter called "the respondent"), appealed against an assessment made upon him under the Income Tax Act, 1918, Sch. E, in the sum of 939*l.* 16*s.* 11*d.* for the year 1920–21.

The respondent was a professional cricketer in the employment of the Kent County Cricket Club. In 1920 a match under the direction of the club was played at Canterbury for the benefit of the respondent, and the net proceeds derived therefrom amounted to 939*l.* 16*s.* 11*d.*

A professional cricketer in the service of the Kent County Cricket Club is granted a benefit on the express understanding that he allows the proceeds of the benefit to be invested in the name of the trustees of the club during the pleasure of the committee. The income derived from the proceeds invested is paid to the beneficiary. The invested

sum has, however, always eventually been handed over to the professional cricketer when his career as a cricketer is over, or when he finds an investment (such as a share in a business or farm) of which the trustees approve. The following is an extract from the regulations for the staff of the Kent County Cricket Club bearing on the point and in force at the time when the above mentioned match was played: "The committee reserve to themselves an absolute and unfettered discretion as regards benefit matches, the collection of subscriptions in connection with such matches, and dealing with the net proceeds of such matches in any way they may think desirable in the interest of the beneficiary."

The net proceeds derived from the benefit match in question, together with other sums obtained by public subscriptions, were invested by the club during 1920 in the purchase of certain stocks, the dividends on which were received by the club, less income tax deducted, and paid to the respondent. In 1923 these investments were realized, and the proceeds, amounting, with the addition of certain other moneys, to 1914*l.* 14*s.* 5*d.*, were paid by the club to the respondent, and were applied by him, with the approval of the trustees of the club, to the purchase of a farm.

The sole question between the respondent and the appellant was whether the respondent was assessable in respect of the net proceeds, amounting to 939*l.* 16*s.* 11*d.*, derived from the benefit match. It was not contended that there was a liability to assessment in respect of that portion of the benefit moneys paid to the respondent which was obtained by public subscription.

It was contended by the respondent (*a*) that the net proceeds of 939*l.* 16*s.* 11*d.* were in fact received by him from the funds of the general public and not from the funds of his employers, and that they were therefore not an emolument or profit appurtenant to his employment; and (*b*) that the net proceeds were a donation or gift and not assessable to income tax.

The appellant contended (*a*) that the profit, amounting to

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939*l.* 16*s.* 11*d.*, had been awarded by the Kent County Cricket Club to the respondent for services rendered by him as a professional cricketer in their employment; (*b*) that it was a perquisite of his employment; (*c*) that it was assessable under Sch. E; and (*d*) alternatively that it was annual profits or gains assessable under Sch. D.

The Commissioners upheld the respondent's contentions and discharged the assessment.

The question for the opinion of the Court was whether the 939*l.* 16*s.* 11*d.* was a profit from the respondent's employment within the meaning of Sch. E, r. 1, or, alternatively, whether it was an annual profit or gain within the meaning of Sch. D, r. 1 (*b*).

Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellant. The Commissioners have in effect found that the sum now in question was received by the respondent not from his employers but as a gift from the public. There was no evidence to support this finding. The money was raised from the benefit which was allowed by the respondent's employers; it was not a testimonial given to him on his retirement, but was a bonus or temporary addition to his salary, and as such is taxable under Sch. E, r. 1. That rule, which is very wide in its terms, says that "tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension or stipend . . . . is payable in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment." The fact that the payment may have been casual in the sense of being unusual does not prevent it being an "annual" payment within the meaning of the rule: *Ryall* v. *Hoare* (1) and *Martin* v. *Lowry*. (2) In *Cowan* v. *Seymour* (3) Lord Sterndale M.R. pointed out that the question is not disposed of by saying that a particular payment is voluntary; the question is whether it is a profit accruing to the person by

(1) [1923] 2 K. B. 447. (2) Ante, p. 550.
(3) [1920] 1 K. B. 500.

reason of his office. In this case the money undoubtedly came to the respondent by reason of his employment, and is therefore taxable.

W. T. Monckton for the respondent. In this case, as it was in *Cowan* v. *Seymour* (1), the proper inference from all the facts is that the money was paid to the respondent as a testimonial for his services in the past and not as a payment for those services. The difference for this purpose between what is given to a person substantially as a payment for his services and what is given to him as a mere present was clearly stated by Lord Loreburn L.C. in *Blakiston* v. *Cooper* (2), a case relating to Easter offerings, where he said this: "In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present." This sum was, within the language just cited, a gift of an exceptional kind given to the respondent on account of his personal qualities, and was a mere present. The fact that the money is given once only is of importance in considering whether or not it is a testimonial. Fletcher Moulton L.J. said in *Cooper* v. *Blakiston* (3): "When a gift is made of a sum of money it certainly lies on the Crown to show that it is made in such a way and under such circumstances as to be assessable, and I think that a person may undoubtedly give to another, whatever office he may hold in such a way as to make it a personal gift not assessable to income tax." Here the Crown has failed to show that the sum is assessable.

[He also referred to *Turner* v. *Cuxon* (4) and *Herbert* v. *McQuade*. (5)]

(1) [1920] 1 K. B. 500.
(2) [1909] A. C. 104, 107.
(3) [1907] 2 K. B. 688, 702.
(4) (1888) 22 Q. B. D. 150.
(5) [1902] 2 K. B. 631.

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Sir Thomas Inskip S.-G. in reply. Lord Loreburn L.C. did not say in *Blakiston* v. *Cooper* (1) that something in the nature of a testimonial was necessarily outside taxation; he merely threw out the suggestion that it might be outside. In every case the facts have to be considered in order to determine in which category—payment or present—a particular sum falls. In this case the sum was received by the respondent by virtue of his employment.

ROWLATT J. These cases are always difficult to decide, and not the less so because it is not easy to draw the line between questions of law and questions of fact.

In this case the respondent was a professional cricketer in the employment of the Kent County Cricket Club, and in 1920 the club granted him a benefit match, the net proceeds of which, together with certain other sums, were invested by the committee and dealt with by them. By their regulations the committee reserved to themselves an absolute and unfettered discretion as regards benefit matches and collections thereat, and in dealing with the net proceeds therefrom as they might think desirable in the interests of the beneficiary. Therefore it was a voluntary act on the part of the committee to grant this benefit match and to encourage the collection of subscriptions collateral to but in connection with it, the subscriptions being invested with the proceeds of the match. The committee had therefore a completely free hand as to the money, subject to this, that they ought to deal with it in the interests of the beneficiary. In fact the committee invested the net proceeds of the match and the subscriptions in trustee securities, and for two or three years the interest thereon was paid to the respondent, who paid income tax thereon. Thereafter the investments were used to buy a farm for the respondent on his retirement as a professional cricketer. The respondent having been assessed on the proceeds of the benefit match appealed to the Commissioners. The assessment did not extend to so much of the money as represented subscriptions; it was only on

(1) [1909] A. C. 104, 107.

what represented the gate money. In those circumstances the appellant had two facts on the appeal. I do not think that either of them affects the case, but he was perhaps fortunate to have them. Firstly, the money had actually been handed over to the respondent before the appeal was heard, which makes the case look much better, although what had to be decided was, irrespective of whether the money was handed over or not, whether in 1920 tax attached to that money. Secondly, by limiting his claim to the gate money and excluding the amount of the subscriptions, it may be that the edge of any criticism of the appellant's action was a little blunted. But I have to decide this question with regard to the position in 1920, and, frankly, I cannot see any difference between the gate money and the subscriptions. The question is whether these were profits and gains made by the respondent in respect of his employment. The cases show quite clearly that payments may be voluntary and yet taxable, even although they may not be made by those for whom the person immediately works. In each case the question is whether the money is earned by the person in his office, or is in the nature of a donation to him personally, perhaps not unconnected with the circumstance that he has served in the particular office—that as Younger L.J. said in *Cowan* v. *Seymour* (1) may be a sine qua non—and because people had acquired an admiration for him in respect of that office. But is it in the nature of a personal gift or is it remuneration ?

The argument for the respondent is that this was simply a testimonial, a personal gift, and not remuneration. In *Blakiston* v. *Cooper* (2) Lord Loreburn L.C., in dealing with the question of Easter offerings, said this : " Where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might

(1) [1920] 1 K. B. 500, 518. (2) [1909] A. C. 104, 107.

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not have been a voluntary payment for services, but a mere present." There the Lord Chancellor is saying that if the gift is of an exceptional kind it may be a mere present and not be a voluntary payment. In this case I think that this is a testimonial, as to which it may be said that it is a mere present. Several circumstances lead me to this conclusion. To begin with, the sum is a very large one; it is exceptional in that respect, and is exceptional also as being granted only once in a cricketer's career. The sum was about 2000*l.*, while the appellant's earnings were between 200*l.* and 300*l.* It was not granted because he was deserving of further wages or because he was considered to be underpaid. This exceptional sum was collected as an endowment for him, because he was a professional and valiant cricketer of a well known club, a hero in many people's eyes. I do not say that this is conclusive. It looks like a capital sum, if I may use the expression, but I am not deciding the case upon that ground, because a man may earn as income in the year what clearly he will treat as a capital sum when he has got it. But while I do not decide the case upon that ground the largeness of the sum and the fact that it was given on an exceptional occasion are matters to be looked at in determining whether it is an increment of his earnings or a gift. Secondly, the respondent was not to get the sum. When the committee said that he might have a benefit and a collection in connection with it, it was clear from the club's regulations that he was not to finger the money; the committee were to have it and invest it at their discretion, but for his benefit. In fact the committee invested the money and kept it till he retired, and then they bought a farm for him with it. That again by itself does not decide the case in the respondent's favour, because a man may perfectly well devote by agreement to a trust of this kind money which he undoubtedly is to receive by way of annual profits: see per Mathew L.J. in *Bell* v. *Gribble*. (1) This second circumstance, while not decisive, is a matter to be considered when deciding whether the money is earnings or something exceptional in the nature of a gift. There is

(1) [1903] 1 K. B. 517.

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a third circumstance to be considered—namely, the subscriptions which were added to the gate money. The appellant has not sought to bring in the subscriptions, although as I have said I think they are in precisely the same position as the gate money, for the benefit was just a method of appealing to the public who enjoyed a day's cricket and all the more because it was the respondent's benefit.

Those circumstances, the largeness of the sum, the fact that it is liable to this trust, the fact of the subscriptions, and the idea that the amount will be a means of enabling the respondent to provide for himself when his career as a cricketer is over, point to the conclusion that this is not an income profit or gain, but is a donation, a testimonial of an exceptional kind, a mere present such as was referred to by the Lord Chancellor in *Blakiston* v. *Cooper*. (1) In those circumstances the appeal fails. If the question is one of fact I am not differing from the Commissioners; if it is a question of law I think they arrived at a right conclusion.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Halsey, Lightly & Hemsley.*

(1) [1909] A. C. 104, 107.

J. S. H.

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(Including Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

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